

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940

No. 425

**THE METROPOLITAN CASUALTY INSURANCE
COMPANY OF NEW YORK, PETITIONER,**

vs.

FRANK STEVENS

**ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE
OF MICHIGAN**

PETITION FOR CERTIORARI FILED SEPTEMBER 12, 1940.

CERTIORARI GRANTED OCTOBER 28, 1940.

BLANK PAGE

In The
Supreme Court of the United States

October Term, 1939.

No.

FRANK STEVENS,

Respondent,

v.

**R. A. NORTHWAY, Doing Business Under the Assumed
Name of NORTHWAY CLINIC AND HOSPITAL,
R. A. NORTHWAY, ROY B. FISHER,**

Principal Defendants,

**THE METROPOLITAN CASUALTY INSURANCE
COMPANY OF NEW YORK, a Foreign Corpora-
tion,**

Petitioner.

TRANSCRIPT OF RECORD
**On Application For Writ Of Certiorari To the
Supreme Court Of the State Of Michigan.**

**FREDERICK J. WARD,
H. MONROE STANTON,**
1117 Dime Building,
Detroit, Michigan,

ALAN W. BOYD,
Indianapolis, Indiana,
Counsel for Petitioner.

**B. A. WENDROW,
A. A. WORCESTER,**
12 Commercial Building,
Mt. Pleasant, Michigan,
Counsel for Respondent.

BLANK PAGE

INDEX.

PLEADINGS, ETC.

	Page
Calendar entries	iv-vi
Reasons and grounds for appeal and assignments of error	1
Verdict	4
Affidavit for writ of garnishment after judgment ..	6
Writ of garnishment	9
Notice of presenting petition and bond for removal ..	12
Petition for removal of cause from the Circuit Court of the State of Michigan for the County of Isa- bella to the District Court of the United States for the Eastern District of Michigan, Northern Division, on the grounds of a diversity of citi- zenship and affidavit	13
Bond on removal	14
Answer to garnishee defendant's petition for removal of cause	17
Answer to petition for removal of cause from the Cir- cuit Court of the State of Michigan for the County of Isabella to the District Court of the United States for the Eastern District of Michi- gan, Northern Division	19
Order denying motion to transfer cause	20
Notice of removal	21
Order to remand to state court	22
Affidavit of nonappearance	24
Affidavit as basis for default	26
Order	27
Order	29
Affidavit as basis for default	31
Affidavit of nonappearance	33
Bill of exceptions	33
Appearances	45
Exhibit C. Policy of The Metropolitan Casualty Com- pany of New York	51
Exhibit D. Renewal certificate	

Exhibit E. Letter dated August 9, 1937, from Edw. J. Farrell to Dr. R. A. Northway.....	52
Exhibit F. Letter dated September 2, 1937, from H. J. Jeffery to Dr. Roy A. Northway	53
Judgment	54
Judgment filed	55
Proof of service by county clerk	56
Notice by county clerk of entry of judgment.....	58
Proof of service by plaintiff's attorney	59
Notice of motion to set aside default	61
Special appearance and motion to set aside default..	62
Exhibits attached to motion:	
A. Disclosure for the Metropolitan Casualty Insurance Company of New York, a foreign corporation	65
B. Notice of appearance	70
Affidavit of H. Monroe Stanton	72
Answer to motion to set aside default	74
Amendment to motion to set aside default	77
Affidavit of H. Monroe Stanton	78
Affidavit of B. A. Wendrow	80
Answer to amendment to motion to set aside default	82
Affidavit of B. A. Wendrow	84
Affidavit of R. A. Northway	89
Affidavit of Margaret M. Wendrow	91
Affidavit of William E. Crane	93
Affidavit of Henry E. Naegely, Jr.	98
Order denying motion to set aside default	99
Hearing on motion to set aside default	101
Claim of appeal	104
Notice of appeal bond	105
Appeal bond	106
Motion to strike	108
Affidavit in support of motion to strike	110
Answer to motion to strike	112
Affidavit in support of answer to motion to strike..	115
Motion to strike	117
Affidavit of B. A. Wendrow	118
Order denying plaintiff's motion to strike and order adjourning motion to settle the record	120
Order denying garnishee defendant's motion to strike	121
Opinion	121
Certificate of the court	125

TESTIMONY.

Plaintiff's Witness.

Crane, William —

Direct examination (Wendrow) 36

Principal Defendants' Witness.

Northway, Dr. R. A.—

Direct examination 37

ERRORS RELIED UPON.

	Page of Assignment	Page of Error
Assignment of error No. 1.....	1	55-56
Assignment of error No. 2.....	2	
Assignment of error No. 3.....	2	
Assignment of error No. 4.....	2	55-56
Assignment of error No. 5.....	2	
Assignment of error No. 6.....	2	99-101

CALENDAR ENTRIES.

1938.

- Jan. 24. Summons with copy of declaration, issued.
 24. Rules to plead and declaration, filed.
- Feb. 8. Notice of appearance of Frederick J. Ward, filed.
 8. Notice of appearance of McNamara & Browning, filed.
 24. Answer, filed.
 24. Appearance, filed.
 24. Answer, filed.
- Mar. 7. Answer of defendant, Roy B. Fisher, filed.
- Sept. 24. Notice of appearance, filed.
 26. Consent to substitution, filed.
 27. Notice to produce on trial and subpoena, filed.
- Oct. 6. Verdict rendered in favor of plaintiff and against all defendants in the sum of \$10,000.
 18. Notice of motion and motion to enter verdict of no cause for action, filed.
- Nov. 9. Notice of motion and motion to enter verdict of no cause for action, filed.
 15. Answer to motion of R. A. Northway, filed.
 15. Answer to motion of R. A. Northway, doing business under assumed name of Northway Clinic & Hospital, and Roy B. Fisher, filed.
 15. Judgment entry, filed and entered in CCO, page 143.
 15. Order, filed and entered in CCO, page 142.
 26. Notice of motion and motion for new trial, filed.
 28. Notice of motion for new trial, motion for new trial, filed.
 30. Notice and motion for new trial, filed.
 30. Notice and motion for new trial, filed.
- Dec. 3. Stipulation for adjournment of hearing on motion for new trial, filed.
 12. Stipulation for adjournment of hearing on motion for new trial, filed.
 19. Answer to defendant, motion for new trial, filed.

- 19. Notice of retainer, filed.
- 21. Order denying motion for new trial, filed and entered in CCO, page 145.
- 21. Order denying motion for new trial, filed and entered in CCO, page 144.
- 21. Order denying motion for new trial, filed and entered in CCO, page 145.

1939.

- Jan. 5. Order for transcript, filed.
- Feb. 2. Taxed bill of costs of \$212.80, filed.
- Mar. 8. Writ of garnishment, issued.
- 8. Affidavit for writ of garnishment, filed.
- 16. Writ of garnishment, returned and filed.
- 27. Notice of presenting petition and bond for removal, filed.
- 28. Petition for removal, filed at 10 o'clock A. M.
- 28. Bond for removal, filed at 10 o'clock A. M.
- Apr. 5. Answer to garnishee defendant's petition, for removal of cause, filed.
- 7. Answer to petition for removal of cause, filed.
- 10. Proof of service, filed.
- 11. Affidavit of nonappearance, affidavit as basis for default and order, filed.
- 11. Order denying motion to transfer cause, filed and entered in CCO, page 147.
- 15. Notice of removal, filed.
- 17. Order to remand to state court duly certified and filed.
- 17. Affidavit of nonappearance, affidavit as basis for default and order, filed.
- 17. Judgment entered \$10,000, interest \$205, costs of \$212.80.
- 17. Judgment, filed, CCO, page 149.
- 17. Proof of service by county clerk, filed.
- 17. Proof of service by plaintiff's attorney, filed.
- 18. Notice of motion, motion to set aside default and affidavit in support thereof, filed.
- 24. Proof of service of special appearance and motion to set aside default, filed.
- 26. Answer to motion to set aside default, filed.
- 27. Amendment to motion to set aside default and affidavit in support thereof, filed.

- May 1. Claim of appeal, filed.
1. Opinion and order denying motion to set aside default judgment, filed.
1. Appeal bond, filed.
3. Order denying motion to set aside default, filed, CCO, page 153.
5. Answer to amendment to motion to set aside default, filed.
5. Affidavit of proof of service, filed.
6. Notice of filing of appeal bond, filed.
8. Order staying proceedings, filed.
8. Motion to stay proceedings and affidavit thereon, filed.
8. Order staying proceedings, entered in CCO, page 154.
15. Garnishee defendant and appellant's proposed record on appeal, reasons and grounds for appeal and notice of settlement, filed.
15. Notice of filing of appeal bond, filed.
15. Notice and appeal bond, filed.
15. Order approving appeal bond, filed and entered in CCO, page 155.
15. Motion to strike and notice of motion, filed.
20. Notice of motion, motion to strike and affidavit, filed.
27. Answer to motion to strike and affidavit, filed.
- June 12. Order denying plaintiff's motion to strike and order adjourning motion to settle the record, filed.
21. Opinion, filed and entered in CCO, pages 162 and 163.
- July 13. Order denying garnishee defendant's motion to strike, filed and entered in CCO, page 164.

PROCEEDINGS IN THE SUPREME COURT OF THE STATE OF MICHIGAN.

INDEX.

	Page
Calendar entries	126
Judgment (Exhibit H)	155
Order denying motion to set aside default (Exhibit I)	157
Claim of appeal (Exhibit J)	159
Assignments of error and reasons and grounds of appeal (Exhibit K)	160
Calendar entries (Exhibit L)	162
Certificate of clerk of copies of record	165
Proof of service	166
Garnishee defendant and appellant's answer to plaintiff and appellee's motion to dismiss, affidavit and exhibits	167
Answer of the principal defendants to plaintiff and appellee's motion to dismiss	181
Order denying motion to dismiss	186
Opinion	187
Order	189
Application for rehearing of the Metropolitan Casualty Insurance Company, garnishee defendant and appellant	190
Order denying motion for rehearing	202
Order staying execution	203
Petition for stay of process	204
Notice of submitting stay bond for approval	206
Proof of service of notice of submitting stay bond for approval	207
Objections to stay bond	208
Bond	209
Clerk's certificate	211
Order allowing certiorari	211

BLANK PAGE

SUPREME COURT OF MICHIGAN

Appeal from Isabella Circuit Court.

Hon. Ray Hart, Circuit Judge.

Frank Stevens,
Plaintiff and Appellee,

v.

R. A. Northway, doing business under the assumed name of Northway Clinic and Hospital, R. A. Northway, Roy B. Fisher,
Principal Defendants.

The Metropolitan Casualty Insurance Company of New York, a foreign corporation,
Garnishee Defendant and Appellant.

Calendar No. 40692.

ASSIGNMENTS OF ERROR AND REASONS AND GROUNDS OF APPEAL.

(Filed May 15, 1939.)

Now comes the garnishee defendant and appellant, and by Frederick J. Ward and H. Monroe Stanton, its attorneys, says that in the records and proceedings in said cause, in the Circuit Court in the County of Isabella, there is a manifest error as follows:

(1) That the court erred in granting a default judgment against the garnishee defendant, because the plaintiff and his counsel had notice and knowledge that the garnishee defendant was not indebted to the principal defendant, and a disclosure advising the plaintiff and his counsel of the garnishee defendant's position had been served upon plaintiff's counsel.

*Assignments of Error and Reasons and Grounds of
Appeal*

(2) That the default of the garnishee defendant, as taken, was not regular and according to the rules of practice of the court.

(3) That the garnishment summons as issued and served, was not in accordance with the statutes of the state, and the rules of the court, in that it did not give the garnishee defendant the required time within which to file its disclosure.

(4) That the default judgment against the garnishee defendant was taken irregularly and by sharp practice on the part of plaintiff's counsel.

(5) That the garnishee defendant has a good and meritorious defense to the plaintiff's claim, of which plaintiff's counsel had knowledge and notice, and the garnishee defendant has been deprived of its day in court.

(6) That the trial court erred and abused its discretion in denying the motion of the garnishee defendant to set aside the default.

And for the errors aforesaid, the garnishee defendant and appellant prays that the judgment entered in said cause ought to be reversed, vacated and set aside, and the said cause remanded to the state court for trial upon the merits.

Frederick J. Ward,
H. Monroe Stanton,
Attorneys for Garnishee
Defendant and Appellant.

Business Address:
1117 Dime Building,
Detroit, Michigan.
May 13, 1939.

*Verdict***VERDICT.**

Circuit Court,
County of Isabella, Michigan.

Mount Pleasant, Michigan,
October 6, 1938.

The regular September term of Circuit Court for the County of Isabella, Michigan, continued at the courthouse in the city of Mount Pleasant, Michigan, October 6th, 1938.

Present: Hon. Ray Hart, circuit judge.

Court was opened in due form by the deputy sheriff.

Harry McCabe,
Frank Stevens,

v.

R. A. Northway et al.

The jurors heretofore impaneled and sworn sat together and heard further proofs of the parties in full. The arguments of counsel and charges of the court, and, retired from the bar thereof in charge of officers of this court, duly sworn for that purpose to consider their verdict to be given, and, after, being absent for a time, returned again into court and do say upon their oaths that we find in favor of the plaintiff and against all defendants the sum of \$10,000. Court here now adjourned.

Ray Hart,
Circuit Judge.

Hugh D. Johnston,
Clerk.
(Seal.)

Affidavit For Writ of Garnishment After Judgment

**AFFIDAVIT FOR WRIT OF GARNISHMENT
AFTER JUDGMENT.**

(Filed March 8, 1939.)

(Title of Court and Cause.)

State of Michigan,
County of Isabella—ss.

B. A. Wendrow, of Mt. Pleasant, Michigan, being first duly sworn, deposes and says that he is one of the attorneys for Frank Stevens, the plaintiff, in the above entitled cause; that said cause was tried at the September term of said court held in and for said county, between the 27th day of September and the 6th day of October, inclusive, A. D. 1938; that on said 6th day of October, A. D. 1938, a verdict was rendered therein by the jury trying said cause, in favor of said plaintiff and against said defendants for the sum of ten thousand dollars (\$10,000.00); that thereafter motions made by each of said defendants for a directed verdict of no cause for action in their favor, were denied by the court; that thereafter motions to set aside the verdict of the jury and to enter a judgment of no cause for action in favor of the defendants were made by each of said defendants, and were denied by the court; that thereafter motions for a new trial were made by each of said defendants and denied by the court; that on the 15th day of November, 1938, a judgment was duly rendered and entered therein in favor of said plaintiff against said principal defendants for the sum of ten thousand dollars (\$10,000.00) and costs; that no appeal has been taken by said principal defendants, or either of them, from said judgment; that the said principal defendants are justly indebted to said plaintiff upon such judgment in the sum of ten thousand dollars (\$10,000.00), and in the additional sum of two hundred twelve dollars and eighty cents (\$212.80) court costs, which costs were duly taxed against said defendants on the 2nd day of February, A. D. 1938, over and above all legal set-offs, which said sum of ten thousand two hundred twelve dollars and eighty cents (\$10,212.80) is now due and unpaid.

Affidavit For Writ of Garnishment After Judgment

And this deponent further says that he has good reason to believe, and does believe, that the Metropolitan Casualty Insurance Company of New York, a foreign corporation, a nonresident of Isabella county, Michigan, and with principal office in New York City, has property, money, goods, chattels, credits and effects in its hands, and under its custody or control belonging to the said R. A. Northway, doing business under the assumed name of Northway Clinic and Hospital, R. A. Northway, Roy B. Fisher, the above named principal defendants, and that the said, the Metropolitan Casualty Insurance Company of New York, a foreign corporation, is indebted to the said R. A. Northway, doing business under the assumed name of Northway Clinic and Hospital, R. A. Northway, Roy B. Fisher, the above named defendants, whether such indebtedness is now due or not.

And this deponent further says, that he is justly apprehensive of the loss of the said sum of ten thousand two hundred twelve dollars (\$10,212.80) and eighty cents, so due to the said plaintiff from the above named R. A. Northway, doing business under the assumed name of Northway Clinic and Hospital, R. A. Northway, Roy B. Fisher, unless a writ of garnishment issued to the said, the Metropolitan Casualty Insurance Company of New York, a foreign corporation.

And deponent further says that such indebtedness so due from said garnishee defendant to the said principal defendants, is not on account of work or labor performed by said principal defendants.

And further this deponent says not.

B. A. Wendrow.

Subscribed and sworn to before me
this 8th day of March, A. D. 1939.

Leo J. Mulholland,

Notary Public,

Isabella County, Michigan.

My commission expires January 21, 1941.

(Seal.)

Writ of Garnishment

WRIT OF GARNISHMENT.

(Issued March 8, 1939.)

(Title of Court and Cause.)

In the Name of the People of the State of Michigan:
To the Sheriff of the County of Ingham, Greeting:

Whereas, lately, to-wit, on the 15th day of November, A. D. 1938, a judgment was rendered in the Circuit Court for the County of Isabella in favor of said plaintiff and against said R. A. Northway, doing business under the assumed name of Northway Clinic and Hospital, R. A. Northway, Roy B. Fisher, as defendant, for the sum of ten thousand dollars (\$10,000.00) and costs, and

Whereas, said plaintiff has filed in the office of the Isabella county clerk the affidavit of B. A. Wendrow, one of the attorneys for plaintiff, stating in said affidavit, among other things, that deponent has good reason to believe, and does believe that the Metropolitan Casualty Insurance Company of New York, a foreign corporation, a nonresident of Isabella county, Michigan, and with principal offices in New York City, has property, money, goods, chattels, credits and effects, in its hand and under its custody and control belonging to the said R. A. Northway, doing business under the assumed name of Northway Clinic and Hospital, R. A. Northway, Roy B. Fisher, whether such indebtedness is now due or not; that said R. A. Northway, doing business under the assumed name of Northway Clinic and Hospital, R. A. Northway, Roy B. Fisher, are justly indebted to the said plaintiff upon such judgment, in the sum of ten thousand dollars (\$10,000.00), and the additional sum of two hundred twelve dollars and eighty cents (\$212.80) court costs, over and above all legal set-offs, that said sum of ten thousand two hundred twelve dollars and eighty cents (\$10,212.80) is now due and unpaid; that said plaintiff is justly apprehensive of the loss of the same unless a writ of garnishment issue to the aforesaid, The Metropolitan Casualty Insurance Company of New York, a foreign corporation.

Now, therefore, you are hereby commanded to warn and summon the said, The Metropolitan Casualty Insur-

Writ of Garnishment

ance Company of New York a foreign corporation, to appear before said court, at the courthouse in the city of Mt. Pleasant, county of Isabella, on the 31st day of March, A. D. 1939, to make a disclosure in writing, under oath, to be filed with the clerk of said court, touching the liability of said, The Metropolitan Casualty Insurance Company of New York, a foreign corporation, as garnishee of R. A. Northway, doing business under the assumed name of Northway Clinic and Hospital, R. A. Northway, Roy B. Fisher, the said principal defendants in said action as charged in the said affidavit, and that said, the Metropolitan Casualty Insurance Company of New York, a foreign corporation, from the time of due service upon it of this writ shall thenceforth pay no money and deliver no property or effects to the said R. A. Northway, doing business under the assumed name of Northway Clinic and Hospital, R. A. Northway, Roy B. Fisher, the said principal defendants in said action until discharged.

And of this writ you shall make due return.

Issued and executed, under the seal of the court at the city of Mt. Pleasant, Michigan, the place of holding said court this 8th day of March, A. D. 1939.

(Signed) Hugh B. Johnston,
County Clerk.

(Signed) B. A. Wendrow,

(Signed) A. A. Worcester,

Attorneys for Plaintiff.

Business Address:

Suite 12, Commercial Building,

Mt. Pleasant, Michigan.

(Seal.)

Deputy Commissioner of Insurance

DEPUTY COMMISSIONER OF INSURANCE.

State of Michigan,
Department of Insurance—ss.

I, H. B. Corell, of the state of Michigan, do hereby certify, that the attached writ of garnishment, together with two copies thereof, issued from the Circuit Court of the County of Isabella in the case of Frank Stevens, plaintiff, v. R. A. Northway, doing business under the assumed name of Northway Clinic and Hospital, R. A. Northway, Roy B. Fisher, principal defendants; The Metropolitan Casualty Insurance Company of New York, a foreign corporation, garnishee defendant, was this day served upon me by mail by B. A. Wendrow, attorney, and that one copy to which was securely attached a one dollar bill was forwarded by registered mail to the Metropolitan Casualty Insurance Company of New York, H. J. Jeffery, resident attorney, 1756 Penobscot Building, Detroit, Michigan, and that the other copy was filed in this department, all in accordance with the statute in such cases made and provided.

In witness whereof, I have hereunto set my hand and affixed my official seal at Lansing, this 10th day of March, A. D. 1939.

/s/ H. B. Corell,
Deputy Commissioner of
Insurance.

Notice of Presenting Petition and Bond for Removal

**NOTICE OF PRESENTING PETITION AND
BOND FOR REMOVAL.**

(Filed March 27, 1939).

(Title of Court and Cause.)

To: B. A. Wendrow and A. A. Worcester,
Attorneys for Plaintiff,

To: McNamara and Browning,

Attorneys for R. A. Northway, doing business under the assumed name of Northway Clinic and Hospital, and Roy B. Fisher,

To: Crane and Crane,

Attorneys for R. A. Northway, doing business under the assumed name of Northway Clinic and Hospital, and R. A. Northway:

You will please take notice that the Metropolitan Casualty Insurance Company of New York, a foreign corporation, the garnishee defendant in the above entitled cause, will on the 28th day of March, 1939, at 10 o'clock in the forenoon of that day, file in the Circuit Court of the State of Michigan, for the county of Isabella, in said state, and in the clerk's office thereof, in which said suit is now pending, its petition and bond for the removal of said cause from the said circuit court to the District Court of the United States for the Eastern District of Michigan, Northern Division, and that on the 28th day of March, 1939, at 11:30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, said petition and bond will be called up for hearing and disposition before the above court, in which said action is pending. At which time and place you may be present, if you so elect.

Copy of said petition and bond are served herewith.

Yours, etc.,

(Signed) Frederick J. Ward,

(Signed) H. Monroe Stanton,

Special Attorneys for said
Defendant and Petitioner.

Business Address:

1117 Dime Building,
Detroit, Michigan.

*Petition for Removal of Cause from the Circuit Court of
the State of Michigan for the County of Isabella to
the District Court of the United States for the
Eastern District of Michigan, Northern Divi-
sion, on the Grounds of a Diversity of
Citizenship*

**PETITION FOR REMOVAL OF CAUSE FROM THE
CIRCUIT COURT OF THE STATE OF MICHIGAN
FOR THE COUNTY OF ISABELLA TO THE
DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF MICHIGAN,
NORTHERN DIVISION, ON THE GROUNDS OF
A DIVERSITY OF CITIZENSHIP.**

(Filed March 28, 1939.)

(Title of Court and Cause.)

To the Circuit Court for the County of Isabella:

Your petitioner, The Metropolitan Casualty Insurance Company of New York, a foreign corporation, by Frederick J. Ward, its attorney, respectfully represents to this court as follows:

That on or about the 9th day of March, 1939, the above named plaintiff filed an action in the circuit court, in and for the county of Isabella, state of Michigan, praying for a judgment against said The Metropolitan Casualty Insurance Company of New York, a foreign corporation, garnishee defendant, on the grounds that said The Metropolitan Casualty Insurance Company of New York, a foreign corporation, a nonresident of Isabella county, state of Michigan, with its principal office in the city of Newark, New Jersey, has property, money, goods, chattels, credits and effects, in its hands and under its custody and control, belonging to the said R. A. Northway, doing business under the assumed name of Northway Clinic and Hospital, R. A. Northway, Roy B. Fisher.

That thereafter, and on or about the 10th day of March, 1939, a copy of plaintiff's writ of garnishment, with notice to file answer to the same in said cause, was duly served upon the above defendant, by service upon the insurance commissioner of the state of Michigan, as by statute made and provided.

Your petitioner further shows that the amount involved in said action exceeds the sum of three thousand (\$3,000.00) dollars, exclusive of interest and costs

*Petition for Removal of Cause from the Circuit Court of
the State of Michigan for the County of Isabella to
the District Court of the United States for the
Eastern District of Michigan, Northern Divi-
sion, on the Grounds of a Diversity of
Citizenship*

and the time has not elapsed within which your petitioner is allowed, under the practice and the laws of the state of Michigan, and the rules and practice of said court, to appear, plea, demur or answer in said action.

Your petitioner further shows that at the time of the commencement of said suit, and ever since then, and at the present time, the plaintiff in said action, Frank Stevens, was and still is a resident of the city of Mt. Pleasant, state of Michigan, and a citizen of the state of Michigan, and the garnishee defendant, The Metropolitan Casualty Insurance Company of New York, a foreign corporation, at the time of the commencement of said action, was and still is, a corporation organized and existing under the laws of the state of New York, with its principal office and place of business in the city of Newark, state of New Jersey, and is a citizen of the state of New York.

Your petitioner further shows that this is a controversy between citizens of different states, and that more than three thousand (\$3,000.00) dollars, exclusive of interests and costs, is involved therein.

The controversy in this action and every issue of the fact and law herein is wholly between citizens of different states and can be fully determined as between them.

That R. A. Northway, doing business under the assumed name of the Northway Clinic and Hospital, R. A. Northway, and Roy B. Fisher, named as principal defendants in this action, are not necessary parties to the determination of any of the issues involved between the plaintiff and garnishee defendant, and if they have any interest in these issues at all, their interest is the same as the plaintiff's.

Your petitioner herewith presents a good and sufficient bond, as provided by the statute in such cases, that they will enter into the United States District Court for the Northern Division of the Eastern District of Michigan, within thirty days from the filing of this petition, a certified copy of the record in this suit, and for the payment of all costs, that may be awarded by said

*Petition for Removal of Cause from the Circuit Court of
the State of Michigan for the County of Isabella to
the District Court of the United States for the
Eastern District of Michigan, Northern Divi-
sion, on the Grounds of a Diversity of
Citizenship*

court, if the said district court shall hold that this suit was wrongfully, or improperly removed thereto.

Your petitioner therefore prays that this court proceed no further herein, except to make an order of removal as required by law, and to accept the bond presented herewith, and direct a transcript of the record herein to be made by said court as provided by law, and as in duty bound.

Your petitioner will so ever pray.

The Metropolitan Casualty Insur-
ance Company of New York,
a foreign corporation,

By (Signed) Frederick J. Ward,
Attorney.

State of Michigan,
County of Wayne—ss.

Frederick J. Ward, being duly sworn, deposes and says that he is attorney for the garnishee defendant in the above entitled cause, and of the petitioner named in the foregoing petition, and that he has read the same, and know the same to be true, except such matters as may be stated on information and belief, and as to those matters, he verily believes them to be true.

Deponent further says that said petitioner is a foreign corporation, with its office and principal place of business in the city of Newark, state of New Jersey, and none of its corporate officers are residents of the state of Michigan.

That your deponent cites said petition on behalf of said petitioner, and was duly authorized so to do.

Further deponent sayeth not.

(Signed) Frederick J. Ward.

Subscribed and sworn to before me
this 24th day of March, 1939, A. D.

Mabelle E. Vallire,

Notary Public,

Wayne County, Michigan.

My commission expires 6-13-39.

BOND ON REMOVAL.

(Filed March 28, 1939.)

(Title of Court and Cause.)

Know all men by these presents, that we, The Metropolitan Casualty Insurance Company of New York, a foreign corporation, as principal, and the Commercial Casualty Insurance Company, a foreign corporation, as surety, are held and firmly bound unto Frank Stevens, plaintiff, in the above entitled cause, his heirs, executors, administrators and assigns in the sum of five hundred (\$500.00) dollars, lawful money of the United States of America, for the payment of which, well and truly, to be made, we, and each of us, bind ourselves, and each of us, our heirs, executors, administrators, successors, jointly and severally, by these presents.

The condition of this obligation is such that:

Whereas, the said The Metropolitan Casualty Insurance Company of New York, a foreign corporation, has applied by petition to the Circuit Court for the County of Isabella, state of Michigan, for the removal of a certain cause of action, therein pending, wherein Frank Stevens is plaintiff and the said R. A. Northway, doing business under the assumed name of Northway Clinic and Hospital, R. A. Northway, Roy B. Fisher, principal defendants, and the said The Metropolitan Casualty Insurance Company of New York, a foreign corporation, as garnishee defendant, to the District Court of the United States, for the Eastern District of Michigan, Northern Division, for further proceedings on grounds in said petition set forth, and that all further proceedings and said action in said Circuit Court for the County of Isabella be stayed.

Now therefore, if your petitioner, the said The Metropolitan Casualty Insurance Company of New York, a foreign corporation, shall enter into said District Court of the United States for the Eastern District of Michigan, Northern Division, aforesaid, within thirty days from the filing of said petition, a certified copy of the record of such suit, and shall pay or cause to be paid, all costs that may be awarded therein by said District

*Answer to Garnishee Defendant's Petition for Removal
of Cause*

Court of the United States, if this court shall hold that this suit was wrongfully or improperly removed thereto, then this obligation shall be void, otherwise, it shall remain in full force and effect.

Dated this 21st day of March, 1939. A. D.

The Metropolitan Casualty Insurance Company of New York,
a foreign corporation,

By (Signed) Frederick J. Ward,
Attorney.

Commercial Casualty Insurance
Company, a foreign corporation,

By L. E. Hodges,
Attorney in Fact.

**ANSWER TO GARNISHEE DEFENDANT'S
PETITION FOR REMOVAL OF CAUSE.**

(Filed April 5, 1939.)

(Title of Court and Cause.)

Now comes Frank Stevens, plaintiff in the above entitled court and cause, by B. A. Wendrow, one of his attorneys, and for answer to the The Metropolitan Casualty Insurance Company of New York's petition for removal of said cause, says:

Plaintiff admits that on or about the 9th day of March, A. D. 1939, he filed an affidavit for writ of garnishment in the Circuit Court for the County of Isabella, state of Michigan, praying for the issuance of a writ of garnishment against said The Metropolitan Casualty Insur-

*Answer to Garnishee Defendant's Petition for Removal
of Cause*

ance Company of New York, a foreign corporation; admits that said writ was prayed for on the grounds stated in said petition; admits that thereafter, and on or about the 10th day of March, A. D. 1939, a copy of plaintiff's writ of garnishment, with notice to file answer or disclosure to the same in said cause, was duly served upon the above garnishee defendant, by service upon the insurance commissioner of the state of Michigan, as by statute made and provided, admits that the amount involved in said ancillary action exceeds the sum of \$3,000; admits that at said time said petition was served upon plaintiff, to-wit, on the afternoon of the 27th day of March, A. D. 1939, the time had not elapsed within which said petitioner was allowed, under the practice and laws of the state of Michigan, and the rules and practices of said court, to appear, plea, demur, or answer in said action.

Further answering, plaintiff admits that Frank Stevens was and is a resident of the city of Mt. Pleasant, state of Michigan, and a citizen of the state of Michigan; admits that said garnishee defendant was and is a foreign corporation; further answering, plaintiff denies that said garnishment proceeding is a controversy between citizens of different states, but admits that more than \$3,000 is involved therein; further answering, plaintiff denies that the controversy in said action and every issue of the fact and law therein is wholly between citizens of different states, and denies that same can be fully determined as between them; further answering, plaintiff denies that R. A. Northway, doing business under the assumed name of the Northway Clinic and Hospital, R. A. Northway, and Roy B. Fisher, named as principal defendants in said action, are not necessary parties to the determination of any of the issues involved between plaintiff and the garnishee defendant; further answering, denies that if they have any interest in these issues at all, their interest is the same as the plaintiff's.

Wherefore plaintiff shows that because of the denials on his part contained herein, and because of the pleadings now on file in said cause, and because of the nature of said garnishment proceedings and because of the rules

*Answer to Garnishee Defendant's Petition for Removal
of Cause*

of said court and the statutes of the state of Michigan, and the conditions precedent to the said garnishee's right to do business within the state of Michigan, the said garnishee defendant's petition and motion should be denied, and plaintiff prays that an order may be entered so denying same.

Frank Stevens, Plaintiff,
By: B. A. Wendrow,
His Attorney.

State of Michigan,
County of Isabella—ss.

B. A. Wendrow, being first duly sworn, deposes and says that he is one of the attorneys for Frank Stevens, plaintiff in the above-entitled court and cause; that he has read the foregoing answer by him subscribed, and knows the contents thereof, and that the same are true, except as to such matters as may be stated upon his information and belief, and as to those matters he verily believes it to be true.

B. A. Wendrow.

Subscribed and sworn to before me
this 5th day of April, A. D. 1939.

Leo J. Mulholland,
Notary Public,

Isabella County, Mich.

My commission expires January 21, 1941.

Answer to Petition for Removal of Cause from the Circuit Court of the State of Michigan for the County of Isabella.

ANSWER TO PETITION FOR REMOVAL OF CAUSE FROM THE CIRCUIT COURT OF THE STATE OF MICHIGAN FOR THE COUNTY OF ISABELLA.

TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN, NORTHERN DIVISION.

(Filed April 7, 1939.)

(Title of Court and Cause.)

Now comes the defendant, R. A. Northway, doing business under the assumed name of Northway Clinic and Hospital, and R. A. Northway, by his attorneys, Crane & Crane, and objects to the petition heretofore filed herein by The Metropolitan Casualty Insurance Company of New York for the removal of said cause from the Circuit Court for the County of Isabella, State of Michigan, to the District Court of the United States for the Eastern District of Michigan, Northern Division, and says:

I.

That the controversy in this action and every issue of the fact and law herein is not wholly between citizens of different states and cannot be fully determined as between them. The record in this cause shows that the plaintiff, Frank Stevens, is a resident of the county of Isabella, state of Michigan, and that the defendant, R. A. Northway, is a resident of the city of Mt. Pleasant, Isabella county, state of Michigan, and that the defendant, Roy B. Fisher, formerly was a resident of the city of Mt. Pleasant, Isabella county, state of Michigan, and now is a resident of the city of Midland, county of Midland, and state of Michigan. Further, that at the time of the commencement of said action, the Circuit Court for the County of Isabella had unquestioned jurisdiction over all of the parties to the action and that this jurisdiction has continued and does now continue in executing and administering its own process. Further, that the garnishee defendant, The Metropolitan Casualty Insur-

Answer to Petition for Removal of Cause from the Circuit Court of the State of Michigan for the County of Isabella.

ance Company of New York, has domesticated itself in the State of Michigan and has a license and is authorized to do business in the state of Michigan, has power to sue and be sued and for all of the purposes of this action has submitted itself to the jurisdiction of the law of the state of Michigan and the courts of this state and is amenable to process issued by the Circuit Court for the County of Isabella.

II.

They deny that the principal defendants in this action are not necessary parties to the determination of the issues between the plaintiff and garnishee defendant and allege that said defendants are necessary and indispensable parties to this action and allege that the issues and controversies involved herein are not separable.

III.

Further, they object to the removal of said cause for the reason that the writ of garnishment issued by the Circuit Court for the County of Isabella, State of Michigan, is ancillary and is all of the main case heretofore instituted and adjudicated in said court and is substantially an aid of said court in reaching nonleviable assets of the principal defendants.

IV.

Further objecting to the granting of said petition, they say that the Circuit Court for the County of Isabella has complete jurisdiction in the exercise of its own process and especially over the parties herein and that no grounds exist or tenable reasons alleged to remove said cause to the federal court.

Wherefore, R. A. Northway, doing business under the assumed name of Northway Clinic and Hospital, and R. A. Northway pray that this court deny the petition to remove said cause.

Crane & Crane,
Attorneys for R. A. Northway, doing business as Northway Clinic and Hospital, and R. A. Northway.

Dated this 4th day of April, A. D. 1939.

Order Denying Motion to Transfer Cause

ORDER DENYING MOTION TO TRANSFER CAUSE.

(Filed April 11, 1939.)

(Title of Court and Cause.)

At a regular session of the Circuit Court for the County of Isabella, held at the courthouse in the city of Midland, county of Midland, state of Michigan, on Tuesday, the 4th day of April, A. D. 1939.

Present: Hon. Ray Hart, circuit judge.

This cause having come on for hearing upon the petition and motion of the garnishee defendant herein for an order to transfer said cause to the United States District Court for the Eastern District of Michigan, Northern Division, and the said plaintiff being present by one of his attorneys, B. A. Wendrow, and the said principal defendants being present by their attorneys, Crane & Crane, and the said garnishee defendant being present by one of its attorneys, H. Monroe Stanton, and this court having considered the pleadings in said cause and having heard the arguments of counsel of said parties, and after due deliberation thereon,

It is hereby ordered and adjudged that the said garnishee defendants' petition and motion for an order transferring said cause to the United States District Court for the Eastern District of Michigan, Northern Division, be, and the same hereby is denied.

Ray Hart,
Circuit Judge.

Hugh D. Johnston,
Clerk.

Notice of Removal

NOTICE OF REMOVAL.

(Filed April 15, 1939.)

(Title of Court and Cause.)

To: Crane & Crane,

Attorneys for R. A. Northway, doing business under the assumed name of Northway Clinic and Hospital, and R. A. Northway, and Roy B. Fisher, Second National Bank Building, Saginaw, Michigan.

To: B. A. Wendrow,

Attorney for Plaintiff, Frank Stevens, Mt. Pleasant, Michigan.

Sirs:

You will please take notice that a certified copy of all of the papers filed, in connection with the garnishment action in the above entitled cause has been filed in the District Court of the United States for the Eastern District of Michigan, Northern Division, on April 10, A. D. 1939, and that said cause of action has now been removed to said District Court of the United States for the Eastern District of Michigan, Northern Division, and that under the rules and practice of said court and the statutes in such case made and provided, you are not to proceed further with the garnishment action heretofore commenced in the above entitled cause.

(Signed) H. Monroe Stanton,

(Signed) Fred J. Ward,

Attorneys for Garnishee
Defendant.

Business Address:

1117 Dime Bank Building;
Detroit, Michigan.

Dated: April 14, 1939.

*Order to Remand to State Court***ORDER TO REMAND TO STATE COURT.**

(Filed April 17, 1939.)

UNITED STATES OF AMERICA—In the District Court of the United States for the Eastern District of Michigan, Northern Division.

Frank Stevens,
Plaintiff,

v.

R. A. Northway, doing business under the assumed name of Northway Clinic and Hospital, R. A. Northway, Roy B. Fisher,
Principal Defendants.

The Metropolitan Casualty Insurance Company of New York, a foreign corporation,
Garnishee Defendant.

At a session of said court held in the court room in the Federal Post Office Building in Bay City, Michigan, in said district, on the 15th day of April, A. D. 1939:

Present, Honorable Arthur J. Tuttle, United States District Judge.

The motion of the above named plaintiff and the above named principal defendants to remand the above entitled cause to the Circuit Court for the County of Isabella in the state of Michigan having been argued, heard and considered, it is ordered that said motion be, and the same is granted, and that this cause be, and the same is hereby, remanded to the Circuit Court for the County of Isabella in the State of Michigan for further proceedings.

(Signed) Arthur J. Tuttle,

United States District Judge.

AFFIDAVIT OF NONAPPEARANCE.

(Filed April 17, 1939.)

(Title of Court and Cause.)

State of Michigan,
County of Isabella—ss.

B. A. Wendrow, being duly sworn, deposes and says that he is the attorney for Frank Stevens, the above named plaintiff; that a final judgment had heretofore been entered against the above named defendants on, to-wit, the 15th day of November, A. D. 1938, for the sum of ten thousand dollars and costs; that no appeal has been taken by said principal defendants, or either of them, from said judgment, within the time allowed by law; that heretofore, to-wit, on the 8th day of March, A. D. 1939, plaintiff filed his affidavit praying for the issuance of a writ of garnishment to the The Metropolitan Casualty Insurance Company of New York, a foreign corporation, as garnishee defendant of said principal defendants, or some of them; that on said 8th day of March, A. D. 1939, a writ of garnishment was duly issued by the clerk and under the seal of said court, which writ of garnishment was duly served on said garnishee defendant on the 10th day of March, A. D. 1939, as will more fully appear by the return of service on file in said court; that said writ of garnishment, so served commanded the said garnishee defendant, The Metropolitan Casualty Insurance Company of New York, to appear before said court, at the courthouse in the city of Mt. Pleasant, county of Isabella, on the 31st day of March, A. D. 1939, to make a disclosure in writing, under oath, to be filed with the clerk of said court, touching liability of said, The Metropolitan Casualty Insurance Company of New York, as garnishee of said principal defendants; that up to this time, said garnishee defendant has not appeared and filed its disclosure with the clerk of the court as aforesaid: that the time for so doing has not been extended; that no other steps or proceedings have been taken by this plaintiff to extend the time of filing such disclosure beyond the 31st day of

Affidavit of Nonappearance.

March, A. D. 1939; that said garnishee defendant has not entered or caused to be entered its appearance in said cause according to the rules and practice of said court, except that this deponent finds from an examination of the files and records of said court that on, to-wit, the 28th day of March, A. D. 1939, that said garnishee defendant filed in said court and cause, the following papers, to-wit: a petition for removing said cause to the District Court of the United States for the Eastern District of Michigan, Northern Division, a bond on removal, a notice of presenting petition and bond for removal, setting said petition for hearing for the 28th day of March, A. D. 1939, at ten A. M., and a proposed order; and this plaintiff admits that late in the afternoon on the 27th day of March, A. D. 1939, he was served with a copy of the aforescribed papers or pleadings; this deponent further states that he has examined the aforesaid papers or pleadings and shows that same are not an appearance on behalf of said garnishee defendant, nor a disclosure in said cause on behalf of said garnishee defendant, in said court and cause. Further this deponent says not.

(Signed) B. A. Wendrow.

Subscribed and sworn to before me
this 11th day of April, A. D. 1939.

(Signed) Leo J. Mulholland,

Notary Public,

Isabella County, Michigan.

My commission expires January 21, 1941.

AFFIDAVIT AS BASIS FOR DEFAULT.

(Title of Court and Cause.)

State of Michigan,
County of Isabella—ss.

B. A. Wendrow, being duly sworn, deposes and says that he is the attorney for the plaintiff in the above entitled cause; that a final judgment had heretofore been entered against the above named principal defendants on, to-wit, the 15th day of November, A. D. 1939, for the sum of ten thousand dollars and costs; that no appeal has been taken by said principal defendants, or either of them, from said final judgment, within the time allowed by law; that heretofore, to-wit, on the 8th day of March, A. D. 1939, plaintiff filed his affidavit praying for the issuance of a writ of garnishment to the Metropolitan Casualty Insurance Company of New York, a foreign corporation, as garnishee of said principal defendants, or some of them; that on said 8th day of March, A. D. 1939, a writ of garnishment was duly issued by the clerk and under the seal of said court, which writ of garnishment was duly served on said garnishee defendant on the 10th day of March, A. D. 1938, as will more fully appear by the return of service on file in said court; that said writ of garnishment, so served, commanded the said garnishee defendant, The Metropolitan Casualty Insurance Company of New York, to appear before said court, at the courthouse in the city of Mt. Pleasant, county of Isabella, on the 31st day of March, A. D. 1939, to make a disclosure in writing, under oath to be filed with the clerk of said court, touching liability of said, The Metropolitan Casualty Insurance Company of New York, as garnishee of said principal defendants; that up to this time, said garnishee defendant has not appeared and filed its disclosure with the clerk of the court as aforesaid; that the time for so doing has not been extended; that no other steps or proceedings have been taken by this plaintiff to extend the time of filing such disclosure beyond the 31st day of March, A. D. 1939; that this deponent has not been

served with any notice of appearance or of retainer on the part of said garnishee defendant; that this deponent has this day searched the files and records in said cause in the office of the clerk of this court and does not find that said garnishee defendant has filed any notice of its appearance or of retainer, or that it has otherwise appeared or caused its appearance to be entered in said cause and defendant; that this deponent has this day searched the files and records in said cause in the office of the clerk of this court and does not find that said defendant has filed any notice of its appearance or of retainer, or that it has otherwise appeared or caused its appearance to be entered in said cause and that he does not find that said defendant has filed any motion in said cause denying liability, and that no such motion has been served upon this deponent.

Deponent shows, however, that the files and records of said court show that on, to-wit, the 28th day of March, A. D. 1939, that said garnishee defendant filed in said court and cause, the following papers, to-wit, a petition for removing said cause to the United States District Court for the Eastern District of Michigan, Northern Division, a bond on removal, a notice of presenting petition and bond for removal, setting said petition for hearing for the 28th day of March, A. D. 1939, at 10 A. M., and a proposed order; and this deponent admits that late in the afternoon on the 27th day of March, A. D. 1939, he was served with a copy of the aforedescribed papers or pleadings; this deponent further shows that a hearing on said petition was had before said court, sitting in the courthouse in Midland, Michigan, on the 4th day of April, A. D. 1939, at which time the honorable court hearing said matter, rendered its opinion and entered an order, on said 4th day of April, A. D. 1939, denying said garnishee defendant's petition, which order is now on file in said court and cause.

Deponent further states that up to this time no disclosure whatever, of any kind or nature has been filed in said court and cause on behalf of said garnishee defendant, as appears by deponent's examination, made this day of the files in said court and cause, and further that no disclosure has been served upon this de-

Order

ponent in said court and cause; deponent further says that said garnishee defendant has not made and filed in said garnishment action any motion to dismiss or any other special motion and that no motion for security for costs or other special motion of any kind has been served upon this deponent.

Deponent further sayeth not.

(Signed) B. A. Wendrow.

Subscribed and sworn to before me
this 11th day of April, A. D. 1939.

(Signed) Leo J. Mulholland.

Notary Public,

Isabella County, Michigan.

My commission expires January 21, 1941.

ORDER.

(Title of Court and Cause.)

On reading and filing the return of the Insurance Commissioner of the State of Michigan, showing due personal service upon said defendant, The Metropolitan Casualty Insurance Company of New York, of a copy of the writ of garnishment by which the above entitled garnishment action was commenced, the original of which writ set the 31st day of March, A. D. 1939, as the disclosure date in said matter, said disclosure date giving the said garnishee defendant sufficient time as required by law within which to make a disclosure, and said 31st day of March, A. D. 1939, having elapsed since the service of said writ of garnishment upon said garnishee defendant, and no appearance having been entered on the

Order

part of said garnishee defendant and no notice of retainer having been given on the part of said garnishee defendant to said plaintiff or B. A. Wendrow, his attorney, as shown by affidavit on file, and no disclosure of any kind having been made up to this time as appears by the affidavits of B. A. Wendrow, attorney for plaintiff, on file in this court and cause.

On motion of B. A. Wendrow, attorney for said plaintiff, it is ordered that the appearance of said garnishee defendant, The Metropolitan Casualty Insurance Company of New York, a foreign corporation, and its default for not entering its appearance and not filing its disclosure, be and the same are hereby entered, and that said garnishment cause be referred to the court for assessment of the plaintiff's damages.

Dated this 11th day of April, A. D. 1939.

(Signed) Hugh D. Johnston,
County Clerk.

B. A. Wendrow, (Signed)
Attorney for Plaintiff.

ORDER.

(Filed April 17, 1939.)

(Title of Court and Cause.)

On reading and filing the return of the Insurance Commissioner of the State of Michigan, showing due personal service upon said defendant, The Metropolitan Casualty Insurance Company of New York, a foreign corporation, of a copy of the writ of garnishment by which the above-entitled garnishment action was com-

Order

menced, the original of which writ set the 31st day of March, A. D. 1939, as the disclosure date in said matter, said disclosure date giving the said garnishee defendant sufficient time as required by law within which to make a disclosure, and said 31st day of March, A. D. 1939, having elapsed since the service of said writ of garnishment upon said garnishee defendant, and no appearance having been entered on the part of said garnishee defendant and no notice of retainer having been given on the part of said garnishee defendant to said plaintiff or B. A. Wendrow, his attorney, as shown by affidavit on file, and no disclosure of any kind having been made up to this time as appears by the affidavits of B. A. Wendrow, attorney for plaintiff, on file in this court and cause; and said garnishee defendant having filed its petition for removal of said cause to the District Court of the United States for the Eastern District of Michigan, Northern Division, and a motion to remand having been made and said cause having been remanded to the Circuit Court for Isabella County, as shown by the certificate to remand, remanding said cause, now on file in this court and cause;

On motion of B. A. Wendrow, attorney for said plaintiff, it is ordered that the appearance of said garnishee defendant, The Metropolitan Casualty Insurance Company of New York, a foreign corporation, and its default for not entering its appearance and not filing its disclosure, be and the same are hereby entered, and that said garnishment cause be referred to the court for assessment of plaintiff's damages.

Dated this 17th day of April, A. D. 1939.

(Signed) Hugh D. Johnston,
Isabella County Clerk.

(Signed) B. A. Wendrow,
Attorney for Plaintiff.

Affidavit as Basis for Default

AFFIDAVIT AS BASIS FOR DEFAULT.

(Filed April 17, 1939.)

(Title of Court and Cause.)

State of Michigan,
County of Isabella—ss.

B. A. Wendrow, being duly sworn, deposes and says that he is the attorney for the plaintiff in the above-entitled cause; that a final judgment had heretofore been entered against the above named principal defendants on, to-wit, the 15th day of November, A. D. 1939, for the sum of ten thousand dollars and costs; that no appeal has been taken by said principal defendants, or either of them, from said final judgment, within the time allowed by law; that heretofore, to-wit, on the 8th day of March, A. D. 1939, plaintiff filed his affidavit praying for the issuance of a writ of garnishment to The Metropolitan Casualty Insurance Company of New York, a foreign corporation, as garnishee of said principal defendants, or some of them; that on said 8th day of March, A. D. 1939, a writ of garnishment was duly issued by the clerk and under the seal of said court, which writ of garnishment was duly served on said garnishee defendant on the 10th day of March, A. D. 1939, as will more fully appear by the return of service on file in said court; that said writ of garnishment, so served, commanded the said garnishee defendant, The Metropolitan Casualty Insurance Company of New York, to appear before said court, at the courthouse in the city of Mt. Pleasant, county of Isabella, on the 31st day of March, A. D. 1939, to make a disclosure in writing, under oath, to be filed with the clerk of said court, touching liability of said, The Metropolitan Casualty Insurance Company of New York, as garnishee of said principal defendants; that up to this time, said garnishee defendant has not appeared and filed its disclosure with the clerk of the court as aforesaid; that the time for so doing has not been extended; that no other steps or proceedings have been taken by this plaintiff to extend the time of filing such disclosure beyond the 31st day of March, A.

Affidavit as Basis for Default

D. 1939; that this deponent has not been served with any notice of appearance or of retainer on the part of said garnishee, that he does not find that said defendant has filed any motion in said cause denying liability, and that no such motion has been served upon this deponent; that said garnishee defendant filed its petition for removal of said cause to the District Court of the United States for the Eastern District of Michigan, Northern Division; that on motion to remand, said cause was remanded to the Circuit Court for the County of Isabella; that the certificate showing that said cause has been so remanded to this court is on file in this court and in this cause.

Deponent further states that up to this time no disclosure whatever, of any kind or nature, has been filed in said court and cause on behalf of said garnishee defendant, as appears by deponent's examination made this day of the files in said court and cause, and further that no disclosure has been served upon this deponent in said court and cause; deponent further says that said garnishee defendant has not made and filed in said garnishment action any motion to dismiss or other special motion and that no motion for security for costs or other special motion of any kind has been served upon this deponent.

Deponent farther sayeth not.

(Signed) B. A. Wendrow.

Subscribed and sworn to before me
this 17th day of April, A. D. 1939.

(Signed) Hugh D. Johnston,

Notary Public,

Isabella County, Mich.

My commission expires January 29, 1943.

Affidavit of Nonappearance

AFFIDAVIT OF NONAPPEARANCE.

(Filed April 17, 1939.)

(Title of Court and Cause.)

State of Michigan,
County of Isabella—ss.

B. A. Wendrow, being duly sworn, deposes and says that he is the attorney for Frank Stevens, the above named plaintiff; that a final judgment had heretofore been entered against the above named defendants on, to-wit, the 15th day of November, A. D. 1938, for the

sum of ten thousand dollars and costs; that no appeal has been taken by said principal defendants, or either of them, from said judgment, within the time allowed by law; that heretofore, to-wit, on the 8th day of March, A. D. 1939, plaintiff filed his affidavit praying for the issuance of a writ of garnishment to the Metropolitan Casualty Insurance Company of New York, a foreign corporation, as garnishee defendant of said principal defendants, or some of them; that on said 8th day of March, A. D. 1939, a writ of garnishment was duly issued by the clerk and under the seal of said court, which writ of garnishment was duly served on said garnishee defendant on the 10th day of March, A. D. 1939, as will more fully appear by the return of service on file in said courthouse in the city of Mt. Pleasant, County of Isabella, on the 31st day of March, A. D. 1939, to make a disclosure in writing, under oath, to be filed with the clerk of said court, touching liability of said, The Metropolitan Casualty Insurance Company of New York as garnishee of said principal defendants; that up to this time said garnishee defendant has not appeared and filed its disclosure with the clerk of the court as aforesaid; that the time for so doing has not been extended; that no other steps or proceedings have been taken by this plaintiff to extend the time of filing such disclosure beyond the 31st day of March, A. D. 1939; that said garnishee defendant has not entered or caused to be entered its appearance in said cause according to the rules and

Affidavit of Nonappearance

practice of said court; that said garnishee defendant filed its petition for removal of said cause to the District Court of the United States for the Eastern District of Michigan, Northern Division; that on motion to remand, said cause was remanded to the Circuit Court for the County of Isabella; that the certificate showing that said cause has been so remanded to this court is on file in this court and in this cause. Further deponent says not.

(Signed) B. A. Wendrow.

Subscribed and sworn to before me
this 17th day of April, A. D. 1939.

(Signed) Hugh D. Johnston,
Notary Public,
Isabella County, Mich.

My commission expires January 29, 1943.

*Bill of Exceptions***BILL OF EXCEPTIONS.**

STATE OF MICHIGAN—In the Circuit Court for the
County of Isabella.

Frank Stevens,
Plaintiff;

v.

R. A. Northway, doing busi-
ness under the assumed
name of Northway Clinic
and Hospital, R. A. North-
way, and Roy B. Fisher,
Principal Defendants,
and

The Metropolitan Casualty
Ins. Company of N. Y.,
Garnishee Defendant.

At a session of said court held at the courthouse in the
city of Mt. Pleasant, April 17, 1939.

Present, Hon. Ray Hart, Circuit Judge.

Appearances:

B. A. Wendrow, Attorney at Law, Mt. Pleasant,
Mich., and

A. Worcester, Attorney at Law, Big Rapids, Mich.,
For Plaintiffs;

Crane & Crane, represented by William Crane,
Attorney at Law, Saginaw, Mich., representing
principal defendants.

Mr. Worcester: If the court please, as I understand
it, the case of Stevens v. Northway, and Dr. Northway,
doing business as the Northway Clinic and Hospital, is up
this morning.

Now, if the court please, in this case, as the court
knows, judgment was rendered against both defend-
ants in favor of the plaintiff for \$10,000.00 and costs,
which have been taxed.

Bill of Exceptions

Writ of garnishment was issued out of this court on the 8th day of March, returned on the 31st day of March. No disclosure has been filed in this court.

The garnishee defendant filed a petition for removal, as the court knows. It was denied by this court and in spite of that fact they attempted to remove to the federal court, and filed a disclosure in the federal court.

A motion to remand was made in the federal court and was granted and the case has been remanded to this court and the certificate remanding it to this court is on file.

Default has been taken against the garnishee defendant for not having filed this disclosure and not having appeared in this court.

The courts have held consistently that an appearance in this court for the purpose of moving or petitioning for removal to the federal court amounts simply to a special appearance. So, there is no appearance in this court, whatsoever, by the garnishee defendant. For citation of the authorities I would like to cite Sec. 71 of Title 28, of the U. S. C. A., and referring specially to pages 376 to 383 in that case. In that citation is found a case almost like this, where the case was taken,—that is, from the circuit court, from the state court, to federal court on petition for removal and was remanded to the state court. Default was taken and judgment had been upon that default and the court held that inasmuch as the federal court did not take jurisdiction, but remanded it back to the circuit court of the state; that the state court had jurisdiction all the time, and that the proceedings were just as though no petition for removal had been made. So that as we view the law, and I am positive it is right, we are in here this morning with our full right to take judgment by default.

The Court: What is that case you refer to?

Mr. A. Worcester: The case I referred to specially is the case of Morbeck v. Bradford-Kennedy Company. It is found on page 369. It is a case started in Idaho (etc., not reported by stenog.).

We will offer the policy issued to Dr. Northway and show that it has been fully complied with by Dr. North-

Bill of Exceptions

way, which will entitle us to a judgment for the full amount of the judgment that was rendered in favor of the plaintiff, plus the costs which have been advanced.

Mr. Wendrow: The files show that on the 8th of March writ of garnishment was issued from this court to the Metropolitan Casualty Ins. Company of New York. March 10th, served as appears by the proof of service on file, and which writ set the 31st day of March as disclosure date. On the 11th of this month, that is April,—and I might mention to the court that while the statute requires that the date be set not less than fourteen days, that is the return date—the plaintiff in this case gave the defendant a much longer time, or, in other words, over 21 days in which to disclose and on the 11th of this month the plaintiff filed its affidavit of nonappearance. This affidavit is basis for default, showing that no disclosure had been made of any kind, and upon which affidavits the court entered the order directing the taking of proofs in this matter.

The file will show, your honor, that today, that is the 17th day of April, there was a certificate filed from the federal court, showing that such case had been remanded, and that certificate is on file here.

The Court: This is the order you referred to, order to remand?

Mr. Wendrow: That was filed today, is on file now.

The Court: Has the other side had a copy of the order?

Mr. Wendrow: Yes, that was—all papers have been served on the opposite parties.

The Court: Is proof of service here?

Mr. Wendrow: Mr. Monroe Stanton. He served Mr. Stanton with copy of the order remanding.

The Court: There is no proof of it.

Mr. Worcester: Really they are not entitled to notice.

Mr. William Crane: The attorneys for the garnishee defendant were in the federal court and argued the motion.

The Court: Mr. Stanton?

Mr. William Crane: Mr. Stanton, and argued this, and after the argument and rendering of the order to

William Crane

remand, the judge executed—Judge Tuttle executed the order and I sent them a copy of,—that is, to all the attorneys for the plaintiff, a copy of the order remanding, identical with that copy now on file in this court.

Mr. Wendrow: In order to make doubly sure, the plaintiff in this case filed another affidavit of nonappearance, and the affidavit is the basis for default, and had the clerk enter another order this morning, after the certificate remanding the cause was filed, and that is on file here also.

At this time we are ready to proceed with proofs, first offering in evidence the entire file of the case of Frank Stevens, Plaintiff, v. R. A. Northway, doing business under the assumed name of Northway Clinic and Hospital, R. A. Northway, and Roy B. Fisher, Principal Defendants, and The Metropolitan Casualty Insurance Company of New York, Garnishee Defendant. We are offering the file in evidence, the entire file in evidence, especially the judgment entered, dated November 15, 1938, signed by Judge Hart, Judge, and countersigned by the clerk.

We are also offering the Journal of the Isabella county clerk, as same relates to this particular case,—offering the same in evidence. I don't think it is necessary to mark this an exhibit. It is part of the files of the court.

(Exhibit A marked,—Judgment.)

Mr. Wendrow: At this time we are offering specifically the judgment entered, marked Plaintiff's Exhibit A, in evidence at this time, and ask it be admitted. We are asking that the judgment be admitted in evidence.

The Court: Admitted in evidence.

CRANE, WILLIAM, sworn for plaintiff, testified as follows: . . .

Direct Examination.

By Mr. Wendrow:

Q. Your name?

A. William Crane.

Q. You are an attorney, duly licensed to practice law in the state of Michigan?

Dr. R. A. Northway

A. I am licensed to practice in the state of Michigan, and I am likewise otherwise admitted to practice in the U. S. District Court for the Eastern District of Michigan.

(Exhibit B marked—Order to remand.)

Q. I hand you Plaintiff's Exhibit B, entitled, "Order to remand to state court," and ask you if you are familiar with that order?

A. I am familiar with the order to remand in this case. It was drafted in our office, although ordered by Judge Tuttle, U. S. District Judge of the Eastern District of Michigan, Southern Division, and signed by the judge on the date set forth and copies of the judgment were addressed to the attorneys of record in the case and I have copies of letters in my file to substantiate that.

Q. Postage fully prepaid?

A. Postage fully prepaid.

Q. And enclosed in an envelope addressed to the various attorneys in this case?

A. Yes.

Q. Each of which envelopes contained a true copy of this order to remand?

A. That is right.

NORTHWAY, DR. R. A., one of the principal defendants, sworn, testified as follows:

Direct Examination.

Q. Doctor, your name is?

A. R. A. Northway.

Q. You are a practicing osteopathic physician with offices in the city of Mt. Pleasant?

A. I am.

Q. State of Michigan?

A. I am.

Q. And you have practiced for how many years?

A. Thirty years.

Q. Now, did you purchase a certain professional policy from the Metropolitan Casualty Insurance Company of New York?

A. I did.

(Policy marked Exhibit C.)

Dr. R. A. Northway

Q. I show you Exhibit C, which is a certain policy of insurance, issued by the Metropolitan Casualty Insurance Company of New York, covering Dr. Roy A. Northway, age 49, with address at Exchange Bank Building, Mt. Pleasant, Michigan, stating that you received your D. O. Degree in 1909, and that you are employing one assistant and technician by the name of Roy B. Fisher. Did you purchase that policy? Are you familiar with it?

A. I am.

Q. The policy covers a period from when to when?

A. First day of February, '36 to the first day of February, 1937.

Q. Doctor, are you likewise covered under a policy from the period of February 1, 1937 to February 1, 1938?

A. I was.

(Exhibit D marked, certificate.)

Q. I show you Exhibit D and ask you if that is the original certificate covering the same policy known as Exhibit C from the date of February 1st, 1937 to February 1st, 1938?

A. Yes, that is right.

Q. And you paid a premium of \$57.38 for this insurance?

A. I did.

Mr. William Crane: I would like to offer Exhibits C and D in evidence, your honor.

The Court: Admitted.

Mr. W. Crane: And also Exhibits A and B if they have not been offered yet. I would like to offer all the exhibits to date in evidence.

The Court: They may be admitted.

Mr. Wendrow: I would like a statement from the court admitting, likewise, the entire record and also the Journal Entries in this case in evidence.

The Court: They may be admitted. In this court—

Mr. Wendrow: Yes.

Q. Now, Dr. Northway, the plaintiff in this case, a certain Frank Stevens, is a patient of yours?

A. He was.

Q. And did you direct that he be treated by your assistant, Dr. Roy B. Fisher?

A. I did.

Q. And Dr. Roy Fisher did examine him with an X-ray?

A. He did.

Q. Now, when is the first time, if you can tell the court, that Frank Stevens complained to you that he had been injured or you had been negligent, or your assistant had been negligent in the treatment afforded him?

A. About the first of August, the first week in August, possibly the 5th or 6th.

Q. Of which year?

A. Of 1937.

(Letter marked Exhibit E.)

Q. I show you Defendant's Exhibit E, marked for identification, and ask you what Exhibit E is?

A. It is a letter from Edward Farrell.

Q. From?

A. From Edward J. Farrell to me. It is an answer to a letter I had written him on August 7th.

Q. Who is this Mr. Farrell you mentioned?

A. He is the agent that I bought the policy from in Detroit.

Q. Would you say that he was the general sales agent for the Metropolitan Casualty and Insurance Company of New York?

A. Yes, sir.

Q. And you purchased the professional policies already in evidence from Mr. Farrell?

A. I did.

Q. And you were charged in case of any claim arising to report it to Mr. Farrell?

A. Right.

Q. And you did, by writing to Mr. Farrell, stating that Mr. Stevens was making a demand on you because of some negligence either on your part or Dr. Fisher's part?

A. I did.

Q. And he acknowledged receipt of the claim in the Exhibit E?

A. Yes, sir.

Dr. R. A. Northway

Mr. W. Crane: I would like to offer Exhibit E in evidence.

The Court: It may be admitted.

Q. Dr. Northway, after you had received notice from Mr. Farrell that he knew about the claimed injury sustained by Mr. Stevens, what next occurred? Who contacted you for the company?

A. Mr. H. G. Jefferies called on me, stating he was claim manager for the Metropolitan Casualty Insurance Company of New York for the state of Michigan, and in our conversation he told me that Dr. Fisher was covered under my policy and that I was covered, and that as soon as this suit was settled he would show me how to take care of the Clinic and Hospital Coverage.

The Court: When was that he called on you?

A. I think that was about the middle of August,—a few days after I received the letter from Mr. Farrell.

Q. Did the claim adjuster, Jefferies, in any way lead you to believe, or say anything that indicated that you did not have coverage under the policies you had purchased from his company?

A. No, sir.

Q. Did Mr. Jeffries go over the claim of Mr. Stevens with you and Dr. Fisher at the time he called at your office, and how the claim occurred, and the history of the Stevens claim?

A. Yes.

Q. And did you give him all the history you could of it?

A. I did.

Q. So he knew all about it as far as you could tell him of any knowledge you had or Dr. Fisher had?

A. Yes, sir.

Q. And did he leave instructions as to what you should do in case Stevens attempted to bring suit against you?

A. He did.

Q. What did he tell you on that?

A. He told me if Stevens started suit or made a claim against them to call them and Monroe Stanton of Saginaw.

Q. Who is Monroe Stanton?

A. He is an attorney for, I imagine, this company.

Dr. R. A. Northway

Q. You imagine?

A. I mean he told me he was their attorney and to get in touch with him.

(Letter marked Exhibit F.)

Q. Witness, I show you Exhibit F, marked for identification, being a certain letter from H. J. Jeffry, manager of the Metropolitan Casualty Insurance Company of New York, dated September 2, 1937, and addressed to yourself. Did you receive that letter?

A. I did.

Q. And according to the third paragraph of this letter it states: "In our conversation when I was in Mt. Pleasant a little over two weeks ago it was understood Dr. Fisher was going to handle this situation with this man claiming he was burned by X-ray and that we would be kept advised of any difficulties." Now, did you and Dr. Fisher co-operate with Claim Agent Jeffries of the Metropolitan Casualty Insurance Company of New York and supply him with such information as he requested from time to time.

A. Yes.

Mr. W. Crane: Offer Exhibit F in evidence.

The Court: It may be admitted.

Q. Did the claimant, Stevens, make further demands on you and threats?

A. He did.

Q. And where were they made and about what time?

A. He came to my office and told me that he was going back to Ford Hospital and had to have some money.

Q. Approximately what month?

A. Might have been in September.

Q. Of what year?

A. '37.

Q. And why did you call Attorney Stanton at that time?

A. Well, that was when Stevens made the demand on me for money.

Q. He made a demand on you for money, is that right?

A. That is it.

Q. How did you put in the call for Mr. Stanton?

A. How did I put it in?

Dr. R. A. Northway

Q. Yes, and how did you communicate with him?

A. I called him from the office in front of Mr. Stevens. When Stevens demanded money I said, "I am unable to pay any money if I wanted to. I have a clause in my policy of insurance." "So," I said, "you have to make a demand on me in order that I can even talk to my insurance company," and I called Mr. Stanton that same day, and immediately, while Stevens was in the office.

Q. Did you have a conference with Attorney Stanton for the insurance company after the call?

A. Yes.

Q. Now, explain to the court what happened after this communication with Attorney Stanton for this insurance company relative to the Stanton claim?

A. We met on the following day after I had notified him and after I had identified him and got the contract, called Mr. Stevens in my office.

Q. Did you supply your office for the conference with Claimant Stevens?

A. I did.

Q. Did the Attorney Stanton take a longhand or some sort of a written statement from the Claimant Stevens?

A. He did.

Q. And consultation was had about this claim?

A. It was.

Q. Did Attorney Stanton at that time deny that you had any coverage under this policy that you had purchased from the Metropolitan Casualty Insurance Company of New York?

A. He did not.

Q. He went ahead and handled the claim for you?

A. He did.

Q. And you co-operated with him?

A. I did.

Q. Was there some talk about settling the claim between Attorney Stanton for the insurance company and Claimant Stevens?

A. There was.

Q. What was that conversation?

A. I don't know the amount offered but it was not satisfactory to Mr. Stevens and he refused to sign the settlement.

Dr. R. A. Northway

The Court: Do you know whether that settlement was introduced in evidence at the hearing?

A. It was not.

Mr. Wendrow: We couldn't. It would have been prejudicial error.

The Court: I was wondering.

Mr. Wendrow: It would have been prejudicial, showing compromise settlement of claim.

The Court: I didn't know but what the settlement was—it was not used then?

Mr. Wendrow: No.

Q. Was there some further conversation between Attorney Stanton and Stevens? Were you there all the time they talked?

A. I was not.

Q. You did supply them with office room to talk this matter over?

A. I did.

Q. And you did co-operate with the insurance company and their attorneys, and adjusters and sales agents, during the entire time covered by this claim?

A. Yes, sir.

Q. Now, Dr. Northway, have you fully complied with every request, and every condition and every clause, affecting and under that policy issued to you by the Metropolitan Casualty Insurance Company of New York?

A. Yes, sir.

Q. And you have paid the premiums on the policies?

A. I have.

Q. You have not paid this judgment in this case?

A. I have not.

Q. And you are relying on the insurance company to carry out this contract under the policy and take care of you?

A. Yes.

Q. And as far as you know, to your knowledge, you haven't paid any part of the judgment?

A. Not a part.

Q. Never paid any checks or in any way gave Stevens any money in this case?

A. No.

Dr. R. A. Northway

Q. You haven't dismissed this insurance company, garnishee defendant, in any manner?

A. Not at all.

Q. Dr. Northway, Dr. Roy Fisher is a man who had just been in practice a short time?

A. That is right.

Q. And you know he is of limited financial means?

A. He is.

Q. And he has not paid any part of this judgment?

A. No, sir.

Mr. Wendrow: I might also add that the files and records show there is no satisfaction of this judgment on record or any part of it and at this time we are asking the court to enter judgment in behalf of Frank Stevens, the plaintiff, against the Metropolitan Casualty Insurance Company of New York, garnishee defendant herein, for the sum of, principal sum of \$10,000.00, the amount of the original judgment against the principal defendants, plus the court costs heretofore taxed in the main suit, plus interest on the judgment from the time of entry to this date, and plus the costs of this garnishment action, and interest, of course, on the principal judgment being at the rate of 5 per cent allowed by the statute,—determined at the rate of 5 per cent.

The Court: Do your computing and itemize it.

Mr. Wendrow: At this time I figured interest at so it is \$10,000.00 plus \$205.50. 5 per cent amounts to \$205.50, and \$212.80 costs of the original suit, the total being \$10,418.30, plus costs to be taxed in this suit.

The Court: Under the evidence in this case the court will render judgment for plaintiff, Frank Stevens, against the Metropolitan Casualty Insurance Company of New York, garnishee defendant, for the sum of \$10,000.00, the amount of judgment heretofore obtained by plaintiff against the insured, R. A. Northway, plus the interest on \$10,000.00 from date of entry of judgment to date, \$205.50, and costs of \$212.80, costs of trial heretofore had in this court in the case of Frank Stevens v. R. A. Northway and others. Anything else? You can prepare your judgment.

*Exhibit C***EXHIBIT C.**

(Winnifred Post Dudd.)

Page 1.

**THE METROPOLITAN CASUALTY INSURANCE
COMPANY OF NEW YORK.**

A Stock Company Chartered April 22nd, 1874.

Representations.

Professional Liability Policy.

The following are representations of facts known to and represented by the assured to be true and this policy is issued by the company relying upon the truth thereof.

1. My full name is—Roy A. Northway. Age—49.
Office address—Exchange Bank Building, Mt. Pleasant, Michigan.

2. I was granted the degree of—D. C. From—A. S. O. Date—1909.

3. I do not own or operate a hospital, sanatorium, or clinic except as follows: Northway Clinic and Hospital.

4. No claims for professional errors or mistakes have been made against me except as follows: No exceptions.

5. I am a member in good standing, and take an interest in the educational meetings of the following state or national professional organization: Michigan State Association (osteopathic).

6. I have no partner and employ no doctor full time in my office except as follows: Usually one assistant and a technician, Dr. R. B. Fisher.

7. I am duly licensed and registered to practice my profession under the laws of the state in which I practice, and do not advertise contrary to the standard rules of my profession.

8. My practice is not limited to any special field of my profession except as follows: Not limited.

9. Amount of professional insurance:

(a) Injury to one person—\$20,000.00.

(b) Maximum yearly limit—\$60,000.00.

(c) Court attendance—\$15.00 per day, not exceeding \$100.00 per suit; maximum yearly limit \$300.00.

Exhibit C

10. The premium for the policy as issued is \$57.38.

11. The term of this policy begins at 12:01 a. m., on the 1st day of February, 1936, and ends at 12:01 a. m. on the 1st day of February, 1937, standard time.

In witness whereof, the Metropolitan Casualty Insurance Company of New York, has caused this policy as printed on pages one, two and three to be signed by its president and its secretary; but the same shall not be binding upon the company until countersigned by a duly authorized representative of the company.

(Signed) Howe S. Landers,
President.

(Signed) E. A. Hendon,
Secretary.

Countersigned:

Edward J. Farrell,
Authorized Representative.

JR.

Page 2.

THE METROPOLITAN CASUALTY INSURANCE
COMPANY OF NEW YORK.

(Hereinafter Called the Company.)

In consideration of the payment of the premium and the representations herein set forth does hereby agree with the assured named in said representations, subject to the agreements, limitations and conditions set forth herein and made a part hereof.

Agreements.

I. To defend in the name and on behalf of the assured or his or her estate, all claims or suits, at any time filed on account of alleged negligent occurrences in the practice of the assured's profession during the term of this policy.

II. To indemnify the assured against loss from liability imposed by law upon the assured or his or her estate, on account of professional services rendered or which should have been rendered during the term of this policy.

Exhibit C

III. To indemnify the assured against loss of his time occasioned by necessary attendance in court during the trial of any suit brought against the assured on account of alleged negligent occurrences in the practice of the assured's profession during the term of this policy.

Limitations.

This policy does not cover loss from liability imposed by law upon the assured on account of—

- (1) Professional services of any partner or other doctor whose time is principally employed by the assured, unless named in the representations;
- (2) Acts of the assured or any assistant while in any degree whatever under the influence of intoxicants, anesthetics or narcotics;
- (3) Acts of the assured or any assistant in connection with the violation of any law or ordinance;
- (4) The rendering of therapeutic treatment by X-ray or radium (diagnostic use of X-ray is covered hereunder).
- (5) The use of electric reactions under the formula known as E. R. A.

Subject to the Following Conditions:

1. The company's liability for damages on account of any one injured person shall be limited to the amount stated in Representation 9 hereof and subject to the same limit for each person, the company's total liability, during one policy year shall be limited to the amount stated in Representation 9 as maximum yearly limit.

The liability of the company for loss of the assured's time occasioned by necessary attendance in court during the trial of any suits covered hereunder shall not exceed \$300.00 in any policy year—nor more than \$100.00 in any one suit. Such indemnity shall be limited to \$15.00 for each full day's attendance in court.

2. The company shall not settle or compromise any claim or suit without the written consent of the assured and, subject to his desires must defend any claim or suit until all legal remedies have been exhausted, but the company shall have the sole and exclusive right to control

Exhibit C

the defense of any claim or suit irrespective of the amount of such claim or suit, and the company shall in no event be accountable for any failure or refusal to compromise or settle any claim or suit before trial and judgment.

3. In the defense of any claim or suit covered hereunder the company shall not be required to furnish appeal bond or pay interest on judgments in excess of the amounts provided for injury to one person as stated in Representation 9 of this policy. The cost of defending any suit including the premium on any appeal bond, will be paid in addition to and irrespective of the limit stated in the policy.

4. In case the assured becomes aware of any error or mistake covered hereunder or any alleged error or mistake, claim, or suit, the assured shall, as soon as reasonably possible, give written notice thereof with fullest information obtainable at the time to the company or to any authorized agent of the company. The assured shall at all times render to the company, in connection with claims hereunder, all co-operation and assistance within his power.

5. The assured shall not voluntarily assume any liability or admit any error or mistake; nor incur any expense or settle any claim except at his own cost, without the written consent of the company previously given.

Page 3.

6. If the assured carries a policy of another insurer against any loss covered by this policy, the assured shall not recover from the company a larger proportion of the entire loss than the amount hereby insured bears to the total amount of valid and collectible insurance applicable thereto.

7. This policy may be canceled by either the assured or the company upon written notice to the other stating the date thereafter when such cancellation shall be effective, and thereupon such date shall be the end of the policy term. The termination of the membership of the assured in the state and national professional organization mentioned in Representation 5 of this policy shall automatically terminate coverage under this policy and same shall be considered as canceled by the assured and

Exhibit C

the company will return on demand the unearned premium due on account of such cancellation. If the assured cancels, the earned premium shall be adjusted in accordance with the short rate table printed hereon. If the company cancels, five days' notice thereof shall be sent by mail to the assured at his address stated herein and the earned premium adjusted pro rata.

8. The bankruptcy or insolvency of the assured shall not relieve the company of any of its obligations hereunder. If any person or his legal representative shall obtain final judgment against the assured because of any such injuries and execution thereon is returned unsatisfied by reason of bankruptcy, insolvency or any other cause, or if such judgment is not satisfied within thirty days after it is rendered, then such person or his legal representatives may proceed against the company to recover the amount of such judgment, either at law or in equity, but not exceeding the limit of this policy applicable thereto.

9. This policy is made and accepted subject to the agreements, limitations, conditions and representations set forth herein or endorsed hereon, and upon acceptance of this policy the assured agrees that its terms embody all agreements then existing between himself and this company or any of its agents relating to the insurance described herein, and no officer, agent or other representative of this company shall have power to waive any of the terms of this policy unless such waiver be written upon or attached hereto; nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the assured unless so written or attached.

10. No assignment of interest under this policy shall bind the company unless written consent of the company is endorsed hereon by an officer of the company.

Loyalty Group.

Loyalty Group.
Number 1.

Endorsement.

In consideration of the issuance of the policy to which this endorsement is attached, it is hereby understood and

Exhibit C

agreed that this policy does not cover any claims made by reason of the assured's operation of or ownership in whole or in part of any sanitarium, hospital, clinic, or other business enterprise.

This endorsement is effective as of the February 1st, 1936.

Nothing herein contained shall be held to vary, alter, waive or extend any of the terms, conditions, agreements, or limitations of the undermentioned policy other than as above stated.

Attached to and forming part of policy No. MP-15288 issued by the Metropolitan Casualty Insurance Company of New York to: Roy A. Northway.

(Signed) Hove S. Landers,
President.

Countersigned at:

Edward J. Farrell,

Authorized Representative.

Loyalty Group.

Loyalty Group.

The policy is endorsed on the front as follows: Professional Liability Policy—No. MP15288—Issued to Roy A. Northway, Mt. Pleasant, Michigan. Expires February 1st, 1937. Premium \$57.38.

The Metropolitan Casualty Insurance Company of New York.

Wardrop & Wardrop Insurance Isabella Co. State Bk. Bldg. Phone 118 Mt. Pleasant, Michigan.

Please Read Your Policy.

*Exhibit D***EXHIBIT D.**

(Winnifred Post Dudd.)

(Loyalty Group.)

Attach This Certificate to Your Policy.

**THE METROPOLITAN CASUALTY INSURANCE
CO. OF NEW YORK.**

Chartered 1874.

RENEWAL CERTIFICATE.

Renewal No. MPR 8802.

Continuing in force policy No. 'P 15288.

Name of Assured—Roy A. Northway.

City and State—Exchange Bank Building, Mt. Pleasant, Michigan.

Amount of Policy—\$ for this renewal: Injury to one person \$20,000.00; maximum yearly limit \$60,000.00.

Premium—\$57.38.

In consideration of a premium of fifty-seven and 38/100 dollars (\$57.38) and of the statements which form a part of the policy above described and which the assured by the acceptance of this certificate repeats and declares to be true, the Metropolitan Casualty Insurance Company of New York, hereby agrees to continue in force the said policy from 1st day of February, 1937, to 1st day of February, 1938, at twelve o'clock noon, Standard Time, at the place of the assured's address, designated in the said policy.

In witness whereof, the Metropolitan Casualty Insurance Company of New York, has caused these presents to be signed by its president and secretary, but the same shall not be binding unless countersigned by an authorized representative of the company.

Howe S. Landers,
President.

W. A. Henden,
Secretary.

Exhibit E

Countersigned at Detroit, Mich., this 1st day of February, 1937.

Edward J. Farrell,
(Authorized Representative.)
(Loyalty Group.)

EXHIBIT E.

(Winnifred Post Dudd.)

Telephone Randolph 3146.

EDW. J. FARRELL,
General Insurance and Bonds.

602 Ford Building,
Detroit, Michigan,
Aug. 9, 1937.

Dr. R. A. Northway.

Dear Dr.:

Immediately on receipt of your letter this morning I gave it to the company who will no doubt take action right away. It's too bad we did not know of this sooner.

You will be hearing from the company shortly as to what is being done.

Sincerely,
Edw. J. Farrell.

*Exhibit F***EXHIBIT F.**

(Winnifred Post Dudd.)

Loyalty Group.

The
Metropolitan
Casualty Insurance
Company
of New York.
Organized 1874.

Eastern Department,
Newark, New Jersey.

LOYALTY GROUP,
Detroit Branch Office,
1756 Penobscot Bldg.,
Cadillac 1295, Detroit, Mich.

September 2, 1937.

John R. Cooney, Chairman of Bd.
Howe S. Landers, President.
Wm. B. Rearden, Vice-Pres.
J. Scofield Rowe, Vice-Pres.
James C. Heyer, Vice-Pres.
Winant VanWinkle, Vice-Pres.
Frank W. Franzen, Vice-Pres.
Frank J. Roan, 2nd Vice-Pres.
W. J. Schmidt, 2nd Vice-Pres.
Chas. W. Payne, 2nd Vice-Pres.

Dr. Roy A. Northway,
Exchange Bank Bldg.,
Mt. Pleasant, Michigan.

Dear Dr. Northway:

I received a telephone call from Mr. Barry of F. G. Fisher & Company, manufacturers of X-rays, advising that he has checked your X-ray machine and finds it to be in perfect working condition.

He also mentioned that you wanted to see some one from our company because this man was threatening to start a suit and that we should call on you.

Judgment

In our conversation when I was in Mt. Pleasant a little over two weeks ago, it was understood that Dr. Fisher was going to handle this situation with this man claiming that he was burned by the X-ray, and that we would be kept advised of any developments.

If there has been any change in the situation, we will be glad to hear from you.

Yours very truly,

(Signed) H. J. Jeffery,
Manager.

JUDGMENT.

(Entered Apr. 17, 1939.)

(Title of Court and Cause.)

At a session of said court held at the courthouse in the city of Mt. Pleasant, Michigan, on this 17th day of April, A. D. 1939.

Present: The Honorable Ray Hart, circuit judge.

In this cause judgment having heretofore been entered in favor of the plaintiff and against the principal defendants in the sum of \$10,000.00 and costs having been taxed in the sum of \$212.80 and

The said, the Metropolitan Casualty Insurance Company of New York, a foreign corporation, garnishee defendant, having failed to appear and having failed to file its disclosure herein and within the time provided by law and the rules of the court and the default of the Metropolitan Casualty Insurance Company of New York, a foreign corporation, garnishee defendant, for failure to file its disclosure and to appear or to plead having

Judgment Filed

been duly entered and the court having heard testimony and arguments of counsel on behalf of the plaintiff and the damages of the plaintiff having been regularly assessed by the court at the sum of \$10,418.30, which includes the sum of \$205.50, interest on said judgment heretofore entered, and the court being fully advised in the premises.

Thereupon on motion of B. A. Wendrow, one of the attorneys for the plaintiff, it is ordered and adjudged that plaintiff recover against said, the Metropolitan Casualty Insurance Company of New York, a foreign corporation, garnishee defendant, the sum of ten thousand four hundred eighteen dollars and thirty cents (\$10,418.30) and costs to be taxed and have execution therefor.

(Signed) Ray Hart,
Circuit Judge.

Countersigned:

(Signed) Hugh D. Johnston,
Clerk.

JUDGMENT FILED.

Circuit Court—County of Isabella, Michigan.

Mount Pleasant, Michigan,

April 17, 1939.

The regular March term of Circuit Court for the County of Isabella, Michigan, continued at the courthouse in the city of Mount Pleasant, Michigan, April 17th, 1939.

Present: Honorable Ray Hart, circuit judge.

Court was opened in due form by the deputy sheriff, Ralph Langworthy.

Proof of Service by County Clerk

In this cause the default of the garnishee defendant, the Metropolitan Casualty Insurance Company, of New York, a foreign corporation, for failure to appear having been duly entered, and the damages of the plaintiff having been regularly assessed by the court at the sum of \$10,000.00 plus interest of \$205.50 and costs of \$212.80. Therefore, it is ordered and adjudged that the plaintiff recover against the garnishee defendant, his damage aforesaid, together with his costs and charges to be taxed, and have execution thereof.

Ray Hart,
Circuit Judge.

Hugh D. Johnston,
County Clerk.

PROOF OF SERVICE BY COUNTY CLERK.

(Filed April 17, 1939.)

(Title of Court and Cause.)

State of Michigan,
County of Isabella—ss.

Hugh D. Johnston, being first duly sworn, deposes and says that he is the county clerk in and for Isabella county, Michigan, and the clerk of said circuit court; that on this 17th day of April, A. D. 1939, he served a true copy of the annexed notice of entry of judgment and a true copy of the judgment so entered, upon each of the attorneys named in said notice so attached hereto, by enclosing the same in sealed envelopes and addressed, respectively, to the attorneys named in the attached notice, to the ad-

Proof of Service by County Clerk

dresses named following each of their respective names, upon each of which envelopes so mailed, in which each envelope so mailed was a true copy of the annexed notice of entry of judgment and a true copy of the judgment, was my name and return address, and sufficient legal postage fully prepaid thereon; that each of the aforesaid envelopes was deposited by me in the United States Post Office at Mt. Pleasant, Michigan.

(Signed) Hugh D. Johnston.

Subscribed and sworn to before me
this 17th day of April, A. D. 1939.

(Signed) Margaret Conaway,

Notary Public,

Isabella County, Mich.

My commission expires 1/29/43.

Notice by County Clerk of Entry of Judgment

NOTICE BY COUNTY CLERK OF ENTRY OF JUDGMENT.

(Filed April 17, 1939.)

(Title of Court and Cause.)

To: B. A. Wendrow,
Commercial Building,
Mt. Pleasant, Michigan;
H. Monroe Stanton,
Bearinger Building,
Saginaw, Michigan;
Crane & Crane,
Second National Bank Building,
Saginaw, Michigan;
H. J. Jeffery,
1756 Penobscot Building,
Detroit, Michigan;
Worcester & Worcester,
Attorneys at Law,
Big Rapids, Michigan;
Frederick J. Ward,
1117 Dime Bank Building,
Detroit, Michigan;
McNamara & Browning,
Taylor Building,
Mt. Pleasant, Michigan.

You will please take notice that annexed hereto is a true copy of a judgment dated April 17, 1939, this day entered in the above cause, against the Metropolitan Casualty Insurance Company of New York, a foreign corporation, garnishee defendant.

This notice dated this 17th day of April, A. D. 1939.

(Signed) Hugh D. Johnston,

Isabella County Clerk.

Proof of Service by Plaintiff's Attorney

**PROOF OF SERVICE BY PLAINTIFF'S
ATTORNEY.**

(Filed April 17, 1939.)

(Title of Court and Cause.)

State of Michigan,
County of Isabella—ss.

B. A. Wendrow, being first duly sworn, deposes and states that on the 11th day of April, A. D. 1939, he served a true copy of the following papers, to-wit, affidavit of nonappearance, affidavit as basis for default, and order, all being dated April 11, 1939, and being on file in said court and cause—upon the following named attorneys: H. Monroe Stanton, Bearinger Building, Saginaw, Michigan; Crane & Crane, Second National Bank Building, Saginaw, Michigan; McNamara & Browning, Taylor Building, Mt. Pleasant, Michigan, and Frederick J. Ward, 1117 Dime Bank Building, Detroit, Michigan, by placing true copies of the aforescribed papers in envelopes addressed to the aforesaid respective attorneys, to the addresses following their names, which envelopes were so sealed by me and which envelopes contained my return post office address, and upon each of which envelopes I placed sufficient legal postage, prepaid, and deposited each of said envelopes in the United States Post Office at Mt. Pleasant, Michigan.

Deponent further states that on April 17, A. D. 1939, he served true copies of the following described papers: Affidavit of nonappearance, affidavit as basis for default, and order, all of which were dated April 17, 1939, and the originals of which were on file in said court and cause, by placing true copies of said papers in envelopes addressed to the following attorneys: H. Monroe Stanton, Bearinger Building, Saginaw, Michigan, Frederick J. Ward, 1117 Dime Bank Building, Detroit, Michigan, McNamara & Browning, Taylor Building, Mt. Pleasant, Michigan, upon each of which envelopes was placed the address of the aforesaid attorneys which follow their respective names herein, which envelopes, so addressed,

Proof of Service by Plaintiff's Attorney

after having placed true copies of said papers in same, were sealed by me and each of which contained my return post office address, and upon each of which I placed sufficient legal postage, prepaid, and each of which envelopes were deposited by me in the United States Post Office at Mt. Pleasant, Michigan; I further state that I served a true copy of said papers upon Crane & Crane by delivering a true copy thereof personally to William E. Crane in the city of Mt. Pleasant, Michigan, on the 17th day of April, A. D. 1939.

Deponent further states that on the 11th day of April, A. D. 1939, he notified each of the attorneys to whom the papers above described, dated April 11, 1939, were mailed, that on the 17th day of April, A. D. 1939, at the courthouse in the city of Mt. Pleasant, Michigan, at 10 A. M. of said day, or as soon thereafter as counsel could be heard, that the plaintiff in the above entitled cause would present his proofs and move the court for a judgment against the garnishee defendant, the Metropolitan Casualty Insurance Company of New York—by enclosing a letter in each of the envelopes so addressed to said attorneys setting forth the foregoing notice and facts.

Deponent further states that on the 17th day of April, A. D. 1939, he served a true copy of the judgment entry, dated April 17th, 1939, on file in said cause, copy of which is annexed hereto, by enclosing a true copy of same in an envelope addressed to the following named attorneys: H. Monroe Stanton, Bearinger Building, Saginaw, Michigan; Frederick J. Ward, 1117 Dime Bank Building, Detroit, Michigan; Crane & Crane, Second National Bank Building, Saginaw, Michigan; McNamara & Browning, Taylor Building, Mt. Pleasant, Michigan, and H. J. Jeffery, 1756 Penobscot Building, Detroit, Michigan—which envelopes also contained addresses of the respective attorneys herein named, as herein set forth, which respective envelopes were duly sealed by me and upon each of which was my return post office address, and upon each of which I placed sufficient legal postage, prepaid, and deposited each of said envelopes in the United States Post Office at Mt. Pleasant, Michigan, and in each of which envelopes I also placed a letter notifying the foregoing attorneys that said judgment entry was a

Notice of Motion to Set Aside Default

true copy of the judgment this day entered in the above court and cause.

(Signed) B. A. Wendrow.

Subscribed and sworn to before me
this 17th day of April, A. D. 1939.

(Signed) Hugh D. Johnston.

My commission expires 1/29/43.

NOTICE OF MOTION TO SET ASIDE DEFAULT.

(Filed April 18, 1939.)

(Title of Court and Cause.)

To: B. A. Wendrow,
Attorney for Plaintiff,
Mount Pleasant, Michigan;
McNamara & Browning;
Mount Pleasant, Michigan;
Crane & Crane,
Second National Bank Building,
Saginaw, Michigan,
Attorneys for R. A. Northway, doing business
under the assumed name of Northway Clinic
and Hospital, and R. A. Northway and Roy
B. Fisher:

Please take notice that the attached motion to set aside default will be brought on for hearing before the Circuit Court for the County of Isabella, in the courthouse, in the city of Mt. Pleasant, state of Michigan, on Monday, April 24, A. D. 1939, at 9:30 o'clock in the morn-

Special Appearance and Motion to Set Aside Default

ing, or as soon thereafter as counsel may conveniently be heard.

(Signed) Frederick J. Ward,

(Signed) Monroe Stanton,

Attorneys for Garnishee
Defendant.

Business Address:

514 Bearinger Building,

Saginaw, Michigan.

Dated: April 17th, A. D. 1939.

**SPECIAL APPEARANCE AND MOTION TO SET
ASIDE DEFAULT.**

(Filed April 18, 1939.)

(Title of Court and Cause.)

Now comes The Metropolitan Casualty Insurance Company of New York, a foreign corporation, garnishee defendant in the above entitled cause, and appears specially for the purpose of moving the court now here for an order setting aside the default entered by said plaintiff, on the 17th day of April, A. D. 1939, for the following reasons:

1. That the defendant has a just and meritorious defense to said action.

2. That said cause of action was transferred to the United States District Court for the Eastern District of Michigan, Northern Division, on April 10, A. D. 1939, and that the garnishee defendant herein and therein filed a disclosure in said federal court, on April 10, 1939, and

Special Appearance and Motion to Set Aside Default

served a true copy of same on the plaintiff and principal defendants herein.

3. That on March 28, A. D. 1939, said garnishee defendant, filed a petition for removal of this cause from the Circuit Court for the County of Isabella to the District Court of the United States for the Eastern District of Michigan, Northern Division, and that this court adjourned the hearing on said petition until April 4, A. D. 1939, at which time said court refused to sign a removal order, and that fifteen (15) days had not elapsed between the time the court refused to sign the removal order and the time that default was filed herein, which is contrary to the provisions of Rule 27 of the Michigan Court Rules.

4. That on April 10, A. D. 1939, said cause was removed to the District Court of the United States, Eastern District of Michigan, Northern Division, and that subsequently, the principal defendants herein filed a motion to remand said cause of action to the Circuit Court for the County of Isabella, State of Michigan, and that a hearing was held on said motion, on Saturday, April 15, A. D. 1939, at which time said district court granted the motion to remand, and the time for appearing from said order has not expired.

5. That service of the writ of garnishment herein was served on the insurance commissioner for the state of Michigan, on March 10, A. D. 1939, and that the said garnishee defendant, under Rule 27 of the Michigan Court Rules, had thirty (30) days after the mailing of a copy of the said writ of garnishment, in which to answer or appear, and said garnishee defendant was not required to file a disclosure or other motion prior to the 31st day of March, A. D. 1939, as set forth in the default papers filed herein.

6. That the plaintiff and principal defendants herein had knowledge, when the default papers were filed herein, and at the time of taking default judgment, that said cause of action had been transferred to the District Court of the United States, Eastern District of Michigan, Northern Division.

7. That the filing of the default papers and the tak-

Special Appearance and Motion to Set Aside Default

ing of the default herein were premature and prior to the time authorized by law for taking a default.

8. That at the time default papers were filed herein and judgment taken, the garnishee defendant was not in default, because disclosure had been filed in the afore-said federal court while said court had jurisdiction of said cause of action, and a copy of said disclosure is attached hereto, marked Exhibit A.

9. That the garnishee defendant herein filed an appearance in said federal court, copy of which appearance is attached hereto, marked Exhibit B.

10. That the garnishee defendant herein gave plaintiff and principal defendants herein notice that said cause had been removed to the federal court, as will more fully appear by reference to the file in the above entitled cause.

11. That an affidavit of merits is attached hereto.

12. That at the time the default papers were filed herein, said cause of action had been transferred to the District Court of the United States, Eastern District of Michigan, Northern Division, and that this court had no jurisdiction over said action.

13. That the default filed herein was irregularly entered.

14. That the garnishee defendant herein did file a disclosure in the District Court of the United States, Eastern District of Michigan, Northern Division, on April 10, A. D. 1939, and a copy of said disclosure was served on the plaintiff herein, by mailing a true copy of same, postage fully prepaid, to the plaintiff's attorney, B. A. Wendrow, on April 14, A. D. 1939.

This motion is based upon the files and records in this cause and the affidavit of H. Monroe Stanton, attached hereto.

(Signed) H. Monroe Stanton,
Attorney for Garnishee
Defendant.

Business Address:

514 Bearinger Building,
Saginaw, Michigan.

Dated: April 17th, A. D. 1939.

*Exhibit A***EXHIBIT A.****DISCLOSURE FOR THE METROPOLITAN CAS-
UALTY INSURANCE COMPANY OF
NEW YORK, A FOREIGN
CORPORATION.**

UNITED STATES OF AMERICA—In the District Court
of the United States for the Eastern District of
Michigan, Northern Division.

Frank Stevens,
Plaintiff,

v.

R. A. Northway, doing busi-
ness under the assumed
name of Northway Clinic
and Hospital, R. A. North-
way, Roy B. Fisher,
Principal Defendants,

The Metropolitan Casualty In-
surance Company of New
York, a foreign corpora-
tion,

Garnishee Defendant.

No. 632.

State of Michigan,
County of Wayne—ss. -

Frederick J. Ward, being duly sworn, deposes and says that the garnishee defendant, above named, is a foreign corporation, authorized to do business in the state of Michigan, and that the principal business office of said company is in the state of New Jersey.

Deponent further says that he is the attorney for said garnishee defendant in this cause, and is familiar with the facts in relation thereto, and at the time of the service of the garnishee summons thereon, to-wit, on March 10th, 1939, by serving on the Insurance Commissioner of the State of Michigan, as representative of said garnishee defendant, was not indebted to said principal de-

Exhibit A

fendants, or any of them, in any sum of money whatsoever, and that it had no other money, property, or effects in its hands, or under its control, belonging to said principal defendants, or any one of them.

That as a special defense to any claim said plaintiff or principal defendants should make against said garnishee defendant, it shows to the court that on or about the 1st of February, 1936, the said defendant issued to said R. A. Northway, a policy known as a professional liability policy, and from time to time thereafter, issued renewal certificates on said policy which certificates were subject to all the terms and conditions of said policy.

That said policy, together with any and all renewal certificates, by a special endorsement attached thereto, did not cover any claims made by reason of the operation of said R. A. Northway, principal defendant, or the ownership in whole or in part, by said R. A. Northway, of any sanitarium, hospital, clinic or other business enterprise, and the basis of the claim upon which the judgment was rendered against the said principal defendants, was the result of the operation, ownership and use of the Northway Clinic and Hospital.

For the further reason that by the coverage under said policy, together with all renewals and certificates thereon, was confined exclusively to said R. A. Northway, and work done by him, and not as the result of any loss or claim from the operation of said hospital or clinic, or as the result of delegating his agency to any other person.

That said policy contained a clause that in the event of any injury for which it was claimed said R. A. Northway was liable, he would give immediate notice thereof to the garnishee defendant herein.

That the said R. A. Northway failed to comply with said terms and provisions of said insurance policy with respect to giving notice and failed to give immediate notice to this company of the alleged injury to said Frank Stevens, as soon as said injury or burning was brought to his attention and definitely known by him to be an injury or burn received in his hospital, for which said plaintiff was claiming said R. A. Northway was liable.

For his failure to give such notice was in violation of

Exhibit A

the terms and provisions of said policy, and therefore, this defendant would not be liable.

For the further reason that the cause of the injury or burn, upon which said Frank Stevens, the plaintiff herein, made claim against said garnishee defendant, was the result of the use of an X-ray machine, located and operated at the Northway Clinic and Hospital, and used in a diagnosis by Dr. Roy B. Fisher, who was an employee in the service of said R. A. Northway, at the Northway Hospital and Clinic, and any liability against said defendant, under and by virtue of the terms and provisions of their policy, would be excluded by the endorsement attached thereto, and hereinbefore referred to.

That the alleged burn, caused by the X-ray as herein set forth, is claimed by said Frank Stevens, to have taken place in the latter part of January, 1937, and that the said R. A. Northway, one of the principal defendants herein, and who was covered exclusively by said insurance policy, had knowledge of said burn and claim by said Stevens, immediately and he treated him at his hospital for approximately two weeks in February, 1937, and continued treatment of him during the entire summer of 1937; sent him to hospitals for treatment and assumed the liability thereon; paid for certain medical aid and attention that was received by said Stevens during the summer of 1937, the said R. A. Northway failed and refused to comply with the terms and provisions of said insurance policy, and give immediate notice of said burning and claim under said policy, to said defendant herein, until August 7th, 1937, which was in violation of the terms and provisions of said policy, and would therefore relieve said defendant of any and all liability thereon, or to said R. A. Northway in any manner whatsoever.

That while the said R. A. Northway, one of the principal defendants herein, had notice of the injury and burn existing on Frank Stevens, and during which time he failed to notify said garnishee defendant hereof, he, his assistant, and the Northway Hospital and Clinic admitted liability by reason of medical treatment rendered to said Stevens, by reason of the fact that he sent him to other hospitals, clinics and doctors for attention; paid

Exhibit A

for such medical attention and consented that such medical attention be paid for by the hospital and clinic, all of which was known to said R. A. Northway.

That other medical bills, hospital bills were paid by said Northway, his assistant, or the Northway Clinic and Hospital with his knowledge and permission and he continued to handle said claim through himself and his attorneys for several months, without giving any notice to said insurance company of such injury and claim, all of which prejudiced their rights and interests under said policy, and would relieve them of any and all liability and indebtedness to said R. A. Northway.

That under the terms and provisions of said policy, issued exclusively to said R. A. Northway, all matters which we have here set forth; all of the dealings and relations, admissions of liability; negotiations with attorneys and other transactions which took place from the date of the original claim and X-ray burn, to-wit, January, 1937 to August 7th, 1937, the date he notified said insurance company of such injury, burn and claim, the interests of The Metropolitan Casualty Insurance Company of New York, garnishee defendant herein, were greatly and badly prejudiced, and as a result thereof, there would be no liability on the part of said insurance company, under and by virtue of the terms and provisions of said professional liability policy herein referred.

That immediately upon receiving notice of said injury and claim in August, 1937, the said defendant denied all liability, on said policy, to said principal defendant, R. A. Northway, for the reasons herein set forth, and at the request of said Northway and his attorneys, consented to aid said Northway in defense of the Stevens case, and thereafter and on the 7th day of January, 1936, entered into a nonwaiver agreement with said Northway and said garnishee defendant, wherein said Northway admitted that the policy issued by said garnishee defendant to said Northway, did not cover any claims made by reason of his operation or ownership of a sanitarium, hospital, clinic or other business enterprise, and that said Northway had knowledge of the covenants, and agreement in said policy with respect to reporting any claims or injuries for which there would be any liability thereunder.

Exhibit A

And that said policy was confined to coverage exclusively to R. A. Northway.

That the said Frank Stevens in January, 1937, claimed to have received an X-ray burn while receiving treatment at the Northway Clinic and Hospital, and that he, said Northway, had notice of said claim for X-ray burn of said Stevens for a long period of time; that he rendered his medical treatment, and that a part of the medical bills therefore, were paid by Dr. Roy B. Fisher, one of the defendants herein, and an employee in the Northway Clinic and Hospital.

That he, the said Northway, had been in consultation with his attorney with respect to the claim, had continued to handle the claim, medical treatment and negotiations, up to the date of said agreement, although he, the said R. A. Northway, did not give notice of said claim, burn or injury, or any claim that Stevens was making to the garnishee defendant herein, until August 7th, 1937, and that as the result of such admissions on behalf of said R. A. Northway, which were in violation of the terms and provisions of said professional liability insurance policy, there would be no liability to said garnishee defendant, under and by virtue of said insurance policy, and said garnishee defendant would not have under its control, or in its possession, any money, property, or effects of any kind belonging to said R. A. Northway, or any of the defendants.

That thereafter, under date of January 10th, 1939, and in accordance with the terms and provisions of said nonwaiver agreement, said garnishee defendant, The Metropolitan Casualty Insurance Company of New York, gave notice to said R. A. Northway, that for the reason hereinbefore set forth in this disclosure, and in accordance with the nonwaiver agreement entered into between the parties, and the former notice given to said R. A. Northway, at the time of the original report of this accident, that there was no liability on the part of said garnishee defendant under and by virtue of the terms and provisions of said professional liability policy herein referred to.

And that by reason of all of the foregoing facts, the said garnishee defendant is not indebted to, nor has it

Exhibit B

under its control, any property, moneys, or effects belonging to any of said principal defendants.

Frederick J. Ward.

Subscribed and sworn to before me
this 7th day of April, 1939, A. D.

Mabel I. Vallire,

Notary Public,

Wayne County, Michigan.

My commission expires 6-13-39.

EXHIBIT B.**NOTICE OF APPEARANCE.**

UNITED STATES OF AMERICA—In the District Court of the United States for the Eastern District of Michigan, Northern Division.

Frank Stevens,
Plaintiff,

v.

R. A. Northway, doing business under the assumed name of Northway Clinic and Hospital, R. A. Northway, Roy B. Fisher,

Principal Defendants;

The Metropolitan Casualty Insurance Company of New York, a foreign corporation,

Garnishee Defendant.

C-32.

To the Clerk of the United States District Court:

Kindly enter our appearance for The Metropolitan Cas-

Exhibit B

ualty Insurance Company of New York, a foreign corporation, garnishee defendant in the above entitled cause.

Frederick J. Ward,
H. Monroe Stanton,
Attorneys for Garnishee
Defendant.

Business Address:
1117 Dime Building,
Detroit, Michigan.

To: B. A. Wendrow and A. A. Worcester, Attorneys for Plaintiff;

To: McNamara and Browning, Attorneys for R. A. Northway, doing business under the assumed name of Northway Clinic and Hospital, and Roy B. Fisher;

To: Crane and Crane, Attorneys for R. A. Northway, doing business under the assumed name of Northway Clinic and Hospital, and R. A. Northway:

You will please take notice that we have this day caused our appearance to be entered for The Metropolitan Casualty Insurance Company of New York, a foreign corporation, garnishee defendant in the above entitled action, and demand that a copy of all papers herein be served on us at the office address, 1117 Dime Building, Detroit, Michigan.

Frederick J. Ward,
H. Monroe Stanton,
Attorneys for Garnishee
Defendant.

Business Address:
1117 Dime Building,
Detroit, Michigan.
April 7, 1939.

*Affidavit***AFFIDAVIT.**

(Filed April 18, 1939.)

Title of Court and Cause.)

State of Michigan,
County of Saginaw—ss.

H. Monroe Stanton, being duly sworn, deposes and says that he is an attorney at law and is familiar with all the proceedings in connection with the above entitled cause, and makes this affidavit in support of motion to set aside default judgment entered herein against the garnishee defendant, and says that a writ of garnishment was issued in the above entitled cause, on March 8, A. D. 1939, upon presentation of an application for said writ by B. A. Wendrow, attorney for the plaintiff herein, and that service of said writ of garnishment was made on the Insurance Commissioner of the State of Michigan, on March 10, A. D. 1939, and that on said day, said Insurance Commissioner forwarded a copy of said writ of garnishment, by registered mail, to The Metropolitan Casualty Insurance Company of New York, H. J. Jeffery, resident attorney, 1756 Penobscot Building, Detroit, Michigan.

That on March 28, A. D. 1939, said garnishee defendant filed a petition for removal in the Circuit Court for the County of Isabella, State of Michigan, together with a bond for removal to the District Court of the United States for the Eastern District of Michigan, Northern Division.

That said petition for removal was brought on for hearing before the Circuit Court for the County of Isabella, State of Michigan, and that the said circuit court refused to sign an order for removal of said cause at that time, but adjourned said petition for further hearing until April 4, A. D. 1939, at which time arguments were heard on said petition for removal, and that the Circuit Court for the County of Isabella, did, on April 4, A. D. 1939, after hearing the arguments, refuse to sign said removal order.

Deponent further says that on April 10, A. D. 1939,

Affidavit

a certified copy of all the proceedings, in connection with the garnishment action filed herein, were filed in the District Court of the United States for the Eastern District of Michigan, Northern Division, and that the federal court then and there acquired jurisdiction of said cause of action, as will more particularly appear by reference to file No. C-32 of said District Court of the United States for the Eastern District of Michigan, Northern Division.

Deponent further says that on April 10, A. D. 1939, said garnishee defendant filed a disclosure in said cause of action pending in the District Court of the United States for the Eastern District of Michigan, Northern Division.

That on April 14, A. D. 1939, a true copy of notice indicating that said cause of action had been removed to the federal court was served on the attorney for the plaintiff.

Deponent further states that on April 11, A. D. 1939, a copy of the affidavit of nonappearance was filed in the above entitled cause, together with affidavit for default and rule for default.

Deponent further states that a period of only eleven (11) days elapsed between the time the court signed an order refusing to sign the removal order and the time of the filing of said default papers.

Deponent further states that plaintiff herein never entered an appearance in said cause pending in the District Court of the United States for the Eastern District of Michigan, Northern Division, but that the defendants, through their attorneys, Crane & Crane, filed a motion to remand said cause of action to the Circuit Court for the County of Isabella, which motion was heard in said district court, on Saturday, April 15, A. D. 1939, and that at said time the said district court granted the motion to remand.

Deponent further states that, A. D. 1939, he served a true copy of the disclosures filed in this cause on B. A. Wendrow, attorney for the plaintiff herein.

Deponent further states that the garnishee defendant herein had a good and meritorious defense to said gar-

Answer to Motion to Set Aside Default

nishment action, as the disclosurg heretofore filed in said cause will indicate.

Further deponent saith not.

(Signed) H. Monroe Stanton.

Subscribed and sworn to before me
this 17th day of April, A. D. 1939.

Ruth K. Block,

Notary Public,

Saginaw County, Michigan.

My commission expires 7/14/42.

ANSWER TO MOTION TO SET ASIDE DEFAULT.

(Filed April 26, 1939.)

(Title of Court and Cause.)

Now comes Frank Stevens, above named plaintiff, by B. A. Wendrow and A. A. Worcester, his attorneys, and in answer to the motion to set aside default filed in the above court and cause, says:

1. Answering paragraph 1, plaintiff denies same.
2. Answering paragraph 2, plaintiff neither admits nor denies the same, but leaves the garnishee defendant to its proof as to same; further answering, plaintiff denies the implication that by such alleged transfer, that the Circuit Court for the County of Isabella ever lost jurisdiction of said cause; and further answering, avers that said allegations do not constitute any valid reason in support of said motion.
3. Answering paragraph 3, plaintiff denies that it was necessary that fifteen days elapse after this court refused, on April 4th, to sign said removal order; denies that the

Answer to Motion to Set Aside Default

default alleged was filed contrary to Rule 27 of the Michigan Circuit Court Rules; further answering, plaintiff avers that the action of the circuit judge on April 4th, 1939, was treated by said garnishee defendant as null and void and of no effect; that said garnishee defendant admitted such action was null and void by their allegations in paragraph 2 of their motion and also by their subsequent acts, conduct and proceedings, so had and taken by it and them; further, that up to and on said 4th day of April, 1939, said garnishee defendant, had not entered its appearance in said garnishment action in this court, but on the contrary expressly challenged and denied the jurisdiction of this court in said matter.

4. Answering paragraph 4, plaintiff denies that the time for appearing from the order remanding, made by said federal district court has not expired, for the reason that such order, so made, is not appealable.

5. Answering paragraph 5, plaintiff admits that Section 5 of Rule 27 of the Michigan Court Rules provides that where services of process against corporations is made upon the commissioner of insurance, "the defendant shall not be required to appear or answer thereto until thirty days after the mailing of the copy of such process to such defendant by said commissioner of insurance," but avers that said section is not applicable to the facts in this case and further answering, plaintiff shows that no default papers were filed in said court and cause until thirty days after the mailing of the copy of such process to such defendant by said commissioner of insurance, and further shows, that no disclosure, appearance, answering or pleading was filed by said garnishee defendant in said court and cause prior to the time said default was filed and taken.

6. Answering paragraph 6, plaintiff denies that he had any knowledge of any valid transfer of said cause to the District Court of the United States at the time default papers were filed on the 11th day of April, 1939, and further answering, shows that no such cause was pending in the federal district court at the time default papers were filed on April 17th, 1939, and further answering, shows that this circuit court never lost jurisdiction of said cause.

Answer to Motion to Set Aside Default

7. Answering paragraph 7, plaintiff denies same, and further shows that same raises issues of law which require no answer.

8. Answering paragraph 8, plaintiff denies that said garnishee defendant was not in default in this court; denies that said federal court had jurisdiction at said time or that it ever had jurisdiction of said action; and further answering, avers that any alleged proceedings in said federal court were of no force or effect in this court.

9. Answering paragraph 9, plaintiff neither admits nor denies the same, but leaves the garnishee defendant to its proof in that regard; but further answering, avers that any alleged proceedings in said federal district court were of no force or effect in this court, and still are of no force or effect.

10. Answering paragraph 10, plaintiff admits that at some time he did receive notice of an alleged removal to the federal court, but avers that any alleged proceedings or removal or attempted removal to said federal court or in said federal court were and are of no force or effect in this court.

11. Answering paragraph 11, plaintiff admits that an affidavit is attached to said motion, but denies the sufficiency of same, and denies that same is any reason in support of said motion.

12. Answering paragraph 12, plaintiff denies that this court ever lost jurisdiction of said cause; and further answering, shows that an affidavit of nonappearance and of default and an order based thereon, was made and filed in this court and cause on April 17th, after a certificate of remand, duly executed by the United States District Court for the Eastern District, Northern Division, was filed in this court and cause.

13. Answering paragraph 13, plaintiff denies same, and further shows that same states a conclusion of law which needs no answering.

14. Answering paragraph 14, plaintiff neither admits nor denies the filing of any disclosure in said federal court, and further answering, avers that any such alleged filing was a nullity and of no force or effect in this court, and further answering, shows that no disclosure was ever filed in this court and cause.

Amendment to Motion to Set Aside Default

Further answering generally, this plaintiff avers that said garnishee defendant has set forth no reason which is sufficient, either in law or in fact, to substantiate the relief prayed for.

Wherefore, plaintiff respectfully requests this court to deny said garnishee defendant's motion for an order setting aside the default entered by plaintiff on April 17th, 1939, and to deny any other relief sought by said garnishee defendant in its said motion.

This answer is based upon the files and records in this cause, the affidavit of B. A. Wendrow hereto attached, and the testimony given before this court on the 17th day of April, 1939.

(Signed) B. A. Wendrow,
Attorney for Plaintiff.

Business Address:

Commercial Building,
Mt. Pleasant, Michigan.

Dated: April 22nd, 1939.

**AMENDMENT TO MOTION TO SET ASIDE
DEFAULT.**

(Filed April 27, 1939.)

(Title of Court and Cause.)

Now comes the above named garnishee defendant, The Metropolitan Casualty Insurance Company of New York, a foreign corporation, and, in addition to the reasons heretofore filed to set aside the default judgment heretofore entered in the above entitled cause, adds the following reasons and grounds to set aside said default:

Affidavit.

1. That on April 15, A. D. 1939, B. A. Wendrow, the attorney for the plaintiff herein, agreed with H. Monroe Stanton, attorney for the garnishee defendant, that the default entered in the above entitled cause could be set aside.

2. That the writ of garnishment heretofore issued in this cause against the aforesaid garnishee defendant is null and void and of no effect, because said writ of garnishment does not give said garnishee defendant thirty (30) days in which to file a disclosure, as provided in Section 5 of Rule 27 of the Michigan Court Rules.

These additional reasons for setting aside said default are based upon the files and records in this cause and the affidavit of H. Monroe Stanton attached hereto.

(Signed) H. Monroe Stanton,
Attorney for Garnishee
Defendant.

Business Address:
514 Bearer Building,
Saginaw, Michigan.

Dated: April 26, A. D. 1939.

AFFIDAVIT.

(Filed April 27, 1939.)

(Title of Court and Cause.)

State of Michigan,
County of Saginaw—ss.

H. Monroe Stanton, being duly sworn, deposes and says that on April 15, A. D. 1939, the above entitled

Affidavit.

cause had been transferred to the District Court of the United States for the Eastern District of Michigan, Northern Division, and that on said day, a motion to remand said cause was heard before the court, and that the plaintiff herein did not file an appearance in said federal court action, but that after said motion to remand, filed by the principal defendant herein, was heard and granted, the said B. A. Wendrow, attorney for the plaintiff herein, did agree with your deponent to set aside the default papers entered in this cause and was told by your deponent that before agreeing to such procedure, he would have to get in touch with Mr. Frederick Ward, who is associated with your deponent in this cause of action, and obtain his opinion, and that your deponent did telephone the said B. A. Wendrow the following day, and the said B. A. Wendrow did then inform your deponent that he would not go through with said agreement.

Deponent further states that the writ of garnishment issued in this case provided that disclosure should be made on March 31, 1939, and that said writ of garnishment was served upon the Insurance Commissioner for the State of Michigan, on March 10, 1939, and that said writ of garnishment provided for only twenty-one (21) days from the date of service, in which to allow said garnishee defendant to make a disclosure, rather than thirty (30) days, as required by Rule No. 27 of the Michigan Court Rules.

Further deponent saith not.

(Signed) H. Monroe Stanton.

Subscribed and sworn to before me
this 26th day of April, A. D. 1939.

Ruth K. Block,

Notary Public,

Saginaw County, Mich.

My commission expires July 14, 1942.

*Affidavit.***AFFIDAVIT.**

(Title of Court and Cause.)

State of Michigan,
County of Isabella—ss.

B. A. Wendrow, being first duly sworn, deposes and says that he is the attorney for Frank Stevens, the above named plaintiff; that he makes this affidavit in answer to the affidavit previously made by H. Monroe Stanton, attorney for said garnishee defendant, filed in said court and cause on April 18, 1939.

Deponent admits that H. Monroe Stanton is an attorney at law and admits he is familiar with all the proceedings in connection with the above entitled cause for the reason that said H. Monroe Stanton is one of the attorneys who appeared on behalf of the principal defendants in said court and cause and who was present in court during the trial of said main suit and who apparently and ostensibly was the attorney for said principal defendants during the trial of said main or principal suit.

Deponent admits that a writ of garnishment was issued on March 8th upon his application; admits that service of same was made on the Insurance Commissioner of the State of Michigan; admits that on March 10th said Insurance Commissioner served a true copy of same upon said garnishee defendant, as appears by the proof of service on file in this court.

Deponent admits that the files show that on March 28th, 1939, said garnishee defendant filed a petition for removal of said cause to the U. S. District Court, but shows no appearance whatever was entered at said time in this court and cause on behalf of said garnishee defendant; admits that on April 4th, 1939, arguments were heard on same; admits that the Isabella County Circuit Court refused to sign the order presented and requested, but shows in this regard that any such order made by the court denying garnishee defendant's petition was treated by said garnishee defendant as null and void and of no force or effect, as appears by deponent's own ad-

Affidavit.

missions in its said or his said affidavit, that said garnishee defendant thereafter proceeded to treat said cause as having been transferred and as being within the jurisdiction of the said District Court of the United States for the Eastern District of Michigan, Northern Division.

Further answering the affidavit of H. Monroe Stanton this deponent further states that he has no knowledge that any disclosure was filed in said Federal District Court on April 10th, 1939, but does state that no disclosure of any kind was filed in this court and cause up to that time or on said date; deponent denies that on April 14th, 1939, a true copy of notice indicating that said cause of action had been removed to the federal court was served on this deponent, but does admit receiving such indicated notice on Monday, April 17th, 1939.

Deponent admits that after waiting thirty days after the mailing of the copy of said writ of garnishment was issued in said cause, to said garnishee defendant by said commissioner of insurance, and not until said thirty days had elapsed, and not having received any disclosure by said garnishee defendant made in this court and cause and not having received any notice of appearance, and no appearance having been entered, that said plaintiff, Frank Stevens, by this deponent, did, on the 11th day of April, 1939, file affidavits of nonappearance, default and rule for default.

Deponent denies that a period of eleven days elapsed, as alleged, and further answering, shows that such order so signed was treated as a nullity by said garnishee defendant, and further shows, that at the hearing upon which such order was based, the said garnishee defendant had entered no appearance in said court and cause, but on the contrary had denied the jurisdiction of this court to make such order.

Further, this deponent denies that plaintiff never entered an appearance in the alleged pending cause in said federal court, but shows that said plaintiff, through his attorney, B. A. Wendrow, was present in person on the morning of February 15th, in said Federal District Court in Bay City, and moved said court to remand said cause, or alleged transfer of cause, and argued personally in

Answer to Amendment to Motion to Set Aside Default

support of said motion; admits that attorneys, Crane & Crane likewise moved the court; admits that said court granted the motion to remand.

Deponent denies that on the blank day of April, A. D. 1939, or at any other time, that he ever received a copy of a disclosure filed in this cause; further, deponent denies that said garnishee defendant has a good and meritorious defense to said garnishment action, and denies that any disclosure has ever been filed in said cause; and in further denial of said garnishee defendant's claimed defense, this deponent refers to the sworn testimony of the witnesses given before this court on Monday, April 17th, 1939, at which time judgment was entered against said garnishee defendant, and as to such testimony, deponent incorporates the same herein in support of denial of any claimed defense on the part of said garnishee defendant.

(Signed) B. A. Wendrow.

Subscribed and sworn to before me
this 22nd day of April, A. D. 1939.

(Signed) Leo J. Mulholland,

Notary Public,

Isabella County, Mich.

My commission expires January 21, 1941.

**ANSWER TO AMENDMENT TO MOTION TO SET
ASIDE DEFAULT.**

(Filed May 5, 1939.)

(Title of Court and Cause.)

Now comes the above named plaintiff, Frank Stevens,
and in answer to the additional reasons and grounds

Answer to Amendment to Motion to Set Aside Default

to set aside default set forth in said garnishee defendant's amendment to motion to set aside default dated April 26, 1939, and served upon plaintiff's attorney in open court on April 27, 1939, said plaintiff's answer now here being made pursuant to the order of said court made on April 27th, 1939, which provided, among other things, that plaintiff, by his attorneys, be given leave to file formal answer to said amendments and said affidavit of H. Monroe Stanton, the said plaintiff, by one of his attorneys, B. A. Wendrow, having at said hearing on the 27th day of April, 1939, expressly denied the allegations in said amended motion, and the averments in the affidavit so made by H. Monroe Stanton. Plaintiff says:

1. Answering paragraph 1, plaintiff expressly denies the allegations therein.

2. Answering paragraph 2, plaintiff denies that the writ of garnishment heretofore issued in this cause against the aforesaid garnishee defendant is null and void and of no effect, for the reasons therein stated, and in further answer thereto, plaintiff shows that said garnishment proceedings gave said garnishee defendant the usual time allowed by law in which to file a disclosure and further, that no default was taken or filed until after the time allowed by law within which garnishee defendant might have filed a disclosure in this court.

This answer is based upon the files and records in this court and cause; upon the argument of plaintiff's counsel in open court on April 27, 1939; upon the affidavits of B. A. Wendrow, Dr. R. A. Northway, Margaret M. Wendrow, Attorney William E. Crane, and Attorney Henry E. Naegely, hereto attached.

Dated this 27th day of April, A. D. 1939.

(Signed) B. A. Wendrow,

(Signed) A. A. Worcester,

Attorneys for Plaintiff.

Business Address:

Commercial Building,
Mt. Pleasant, Michigan.

AFFIDAVIT OF B. A. WENDROW.

(Filed May 5, 1939.)

(Title of Court and Cause.)

State of Michigan,
County of Isabella—ss.

B. A. Wendrow, first being duly sworn, deposes and says that he is one of the attorneys for the plaintiff in the above entitled court and cause; that at a hearing held at the courthouse in the city of Midland this morning, he was served by H. Monroe Stanton, with an "Amendment to motion to set aside default"; that during said hearing in open court, deponent denied the allegations contained in said amended motion and especially denied the statements made in the affidavit of H. Monroe Stanton attached thereto; that at the conclusion of said hearing, said court ordered, among other things that plaintiff, by his attorneys, be given leave to file his formal answer to said amendments and the affidavit of H. Monroe Stanton attached thereto; that pursuant to said order deponent now here formally answers the affidavit of said H. Monroe Stanton, as deponent has heretofore done in open court;

1. Categorically answering the affidavit of H. Monroe Stanton, deponent denies that on April 15, A. D. 1939, the above entitled cause had been transferred to the District Court of the United States for the Eastern District of Michigan, Northern Division, but admits that the above garnishee defendant claimed to have transferred same; deponent admits that on the 15th day of April, A. D. 1939, motions to remand were heard before said court; denies that the plaintiff herein did not file his appearance in said federal court action for the reason that deponent was personally present at said time, entered his appearance and moved the court to remand said cause; deponent admits that the motions to remand filed by the principal defendants herein and made by the plaintiff herein, were heard and granted; deponent denies that he agreed with H. Monroe Stanton to set aside the default papers entered in the said cause; denies that he was told

Affidavit of B. A. Wendrow

by H. Monroe Stanton that before agreeing to such procedure, that he, H. Monroe Stanton, would have to get in touch with Mr. Frederick Ward and obtain his opinion; but deponent does admit as hereinafter more specifically set forth, that said H. Monroe Stanton stated he would call Frederick J. Ward in Detroit, but for the purpose of discussing a settlement offer in said case; deponent admits that H. Monroe Stanton did telephone deponent the following day, but denies that he informed H. Monroe Stanton that he would not go through with said alleged agreement for the reason that he had made no such agreement; deponent admits that said writ of garnishment provided that disclosure be made on March 31, 1939; admits that said writ of garnishment was served upon and received by the Insurance Commissioner for the State of Michigan on March 10, 1939, and that on said same date he forwarded a copy of same to said garnishee defendant; deponent denies that said writ of garnishment provided for only twenty-one days from the date of service in which to allow said garnishee defendant to make a disclosure for the reason that same was issued subject to the Michigan Circuit Court Rules and for the further reason that pursuant to said rules no default was taken against said garnishee defendant until after the time had expired, which was required by Rule 27 of the Michigan Court Rules.

2. Further answering the affidavit of said H. Monroe Stanton, as he has heretofore done in open court, deponent states that on the morning of April 15, 1939, he appeared on behalf of the plaintiff before the Honorable Arthur J. Tuttle, judge of the District Court of the United States for the Eastern District of Michigan, Northern Division, and moved said court to remand the above entitled cause to the Isabella County Circuit Court; that at said time, Attorney William E. Crane, a member of the firm of Crane & Crane, attorneys, of Saginaw, Michigan, and Henry E. Naegely, on behalf of the above principal defendants; had likewise moved the court for an order to remand said cause; that at said hearing H. Monroe Stanton appeared on behalf of the above garnishee defendant insurance company and opposed said motions; that at the conclusion of said hearing, said mo-

Affidavit of B. A. Wendrow

tions to remand were granted; that thereupon deponent walked with Henry E. Naegely to the cloak room to get his brief case; that H. Monroe Stanton followed this deponent into said room and commenced a conversation relative to the above entitled cause, in which conversation H. Monroe Stanton several times requested and urged deponent to set aside the default entered in said cause, all of which requests deponent expressly declined, even stating to said H. Monroe Stanton at said time that said insurance company and Attorney Ward had given the plaintiff the run around too long and had fooled around too much to expect any favors from plaintiff; that said H. Monroe Stanton stated he agreed in substance with deponent's reasons for refusing his request; that said H. Monroe Stanton at said time also stated to this deponent that he did not especially care to proceed with said case; that if the above case had been handled the way it should have been and the way he had wanted to handle it, that it would have been settled long ago; deponent further states that at said time H. Monroe Stanton asked this deponent what the plaintiff would take in cash to settle same; that deponent replied that plaintiff might accept somewhat less than the full amount, but that he always felt that the first offer should come from the insurance company; that H. Monroe Stanton stated that Frederick J. Ward of Detroit, co-counsel in said case, still had something to say about the case insofar as a settlement was concerned; that H. Monroe Stanton thereupon stated that he would take the matter of a settlement offer up with the said Frederick J. Ward and promised to telephone deponent the following day, and at said time requested deponent to give him his telephone number in Mt. Pleasant, which deponent did.

3. Deponent states that he thereupon joined Henry E. Naegely, the two of them then proceeding to discuss the conversation just had with H. Monroe Stanton and the probable settlement offer made by H. Monroe Stanton; that they joined William E. Crane, and the three of them proceeded to have lunch together, during which lunch hour the conversation just had with H. Monroe Stanton was repeated and deponent states that at no time during the discussions with aforesaid attorneys Naegely

Affidavit of B. A. Wendrow

and Crane was any mention made of the setting aside of the default or of any agreement in that regard by B. A. Wendrow or anyone else, except insofar as it was discussed that H. Monroe Stanton requested this deponent several times to set aside a default in said case, but that deponent had no choice except to refuse all such requests.

4. Deponent states in the early part of the evening of the following day, to-wit, on Sunday, April 16th, he was in his office; that his office telephone and house telephone are so connected that both ring when incoming calls are made; that he had previously stated to his wife that he expected a long distance phone call from H. Monroe Stanton relative to a settlement offer in said case; that his telephone rang while he was in his office that evening, and states that his wife, Margaret M. Wendrow, also answered same at the residence; that while waiting for the operator to complete the call, deponent requested his said wife to listen to their conversation as she would undoubtedly hear some good news relative to a settlement offer of said Stevens' case; that H. Monroe Stanton spoke to deponent at said time, and his first words were to advise deponent that any settlement offer was "off"; that H. Monroe Stanton also inquired as to whether plaintiff still intended to go ahead with said case in the morning, to which deponent replied, as stated before, that he had no choice in the matter and would proceed as soon as they were able, just as he had previously advised said Stanton by letter; that H. Monroe Stanton thereupon stated that he supposed he would have to be present the following morning at said hearing; that at no time during such call so made by H. Monroe Stanton did he speak of any agreement to set aside a default, or the breach of any such agreement since alleged by him.

5. Deponent further states that on three other different occasions since April 15, H. Monroe Stanton talked with deponent, once on April 24, when H. Monroe Stanton came to deponent's office in Mt. Pleasant, and twice on April 26, when H. Monroe Stanton telephoned deponent relative to the hearing on the 27th—and that on none of said occasions did H. Monroe Stanton ever speak of

Affidavit of B. A. Wendrow

any agreement on deponent's part, as now alleged; that at none of said occasions did H. Monroe Stanton claim any such promise to set aside a default, or claim any breach of such agreement since alleged by him; that, on the contrary, H. Monroe Stanton still continued to request deponent to agree to set aside the default, but to each of which requests deponent replied that he could not and would not, and had no choice but to proceed in the matter, as he had always advised H. Monroe Stanton.

6. Further, as stated in open court this morning, deponent avers that on every other occasion in the past, whenever H. Monroe Stanton requested a favor from deponent, said H. Monroe Stanton, no matter how simple or unimportant same may have been, always insisted upon putting same in writing and required deponent's signature to same. Deponent further shows, as stated in open court, that such request, as now being claimed by H. Monroe Stanton as having been granted, involved a most important concession so far as H. Monroe Stanton was concerned, and that had same been granted, as now claimed, that said H. Monroe Stanton would immediately have reduced same to writing, as was his past, common and usual practice with less important matters. Deponent further shows, as stated in open court, that it would hardly seem reasonable that H. Monroe Stanton should get the opinion of Mr. Frederick Ward, as he now claims, before he, H. Monroe Stanton, would agree to what he, H. Monroe Stanton, most strongly requested and desired; but, on the other hand, deponent shows that it would be reasonable for H. Monroe Stanton to contact Mr. Frederick Ward relative to his opinion on a settlement offer, which deponent avers said H. Monroe Stanton stated he would do, and which information he agreed to take up with deponent by telephone the following day.

7. Deponent further states, as shown in open court, that this morning was the first information he had received as to any such alleged claim or agreement; and the first time such claim had been placed in writing, although H. Monroe Stanton had prepared and filed other papers in this cause since April 15, without making any such claim as now alleged by him. Wherefore de-

Affidavit of R. A. Northway.

ponent avers, as he stated in open court, that any such agreement as now alleged by H. Monroe Stanton is false and untrue and that deponent expressly denies the same for the various reasons heretofore given.

Further deponent saith not.

(Signed) B. A. Wendrow.

Subscribed and sworn to before me
this 27th day of April, A. D. 1939.

(Signed) Leo J. Mulholland,

Notary Public,

Isabella County, Michigan.

My commission expires January 21, 1941.

AFFIDAVIT OF R. A. NORTHWAY.

(Filed May 5, 1939.)

(Title of Court and Cause.)

State of Michigan,
County of Isabella—ss.

R. A. Northway, being first duly sworn, deposes and says that he is a duly licensed and practicing osteopathic physician and surgeon and has been practicing his profession for the past thirty years; that he is one of the defendants in the above entitled cause; that he is acquainted with H. Monroe Stanton for the reason that said Stanton was ostensibly one of his attorneys during the trial of the principal suit begun by the above plaintiff, Frank Stevens, the said H. Monroe Stanton having been so furnished as one of his attorneys by the above insurance company, which H. Monroe Stanton has since

Affidavit of R. A. Northway

advised this deponent that he now represents the above insurance company as their attorney in the above cause.

Deponent states that on Monday, April 24, 1939, H. Monroe Stanton came to his office in Mt. Pleasant, Michigan, and, in the absence of Crane & Crane, deponent's present attorneys, the said H. Monroe Stanton commenced discussing the above case; that at said time said H. Monroe Stanton requested this deponent several times to try to persuade Attorney B. A. Wendrow to set aside the default in said case; that deponent was unfamiliar with the legal effect of the granting of such requests and made no promise or answer to said requests; that during said conversation, H. Monroe Stanton stated that he had attempted on various occasions to get said Attorney B. A. Wendrow to agree to set aside a certain default in said case, but that he had been unsuccessful in his endeavors; that said H. Monroe Stanton further stated that if deponent was unable to persuade said Attorney B. A. Wendrow to set aside such default, that he, H. Monroe Stanton and Attorney Ward in Detroit, would have no choice but to appeal to the United States Circuit Court of Appeals in Cincinnati, thereby putting deponent to additional expense in attorney fees and court costs.

Deponent further states that he is not familiar with legal terms, but can definitely state that at no time during the aforesaid conversation did H. Monroe Stanton ever state to deponent that Attorney B. A. Wendrow had agreed to set aside a default in the above case, or that he had promised so to do; and at no time did said H. Monroe Stanton state or claim to deponent that Attorney B. A. Wendrow had failed to keep an agreement to set aside a default in the above case, but on the contrary, as stated above, said H. Monroe Stanton stated to deponent that he had been unsuccessful in his efforts to have said Attorney B. A. Wendrow agree to set aside such default, and that therefore he was requesting deponent to use his influence in that regard.

Deponent further states that shortly after said conversation he telephoned Attorney B. A. Wendrow and advised him of same, and also contacted his own attorneys, Crane & Crane, and advised them of same.

Affidavit of Margaret M. Wendrow

Further deponent sayeth not.

(Signed) R. A. Northway.

Subscribed and sworn to before me
this 29th day of April, A. D. 1939.

(Signed) Leo J. Mulholland,
Notary Public,
Isabella County, Mich.

My commission expires January 21, 1941.

AFFIDAVIT OF MARGARET M. WENDROW.

(Filed May 5, 1939.)

(Title of Court and Cause.)

State of Michigan,
County of Isabella—ss.

Margaret M. Wendrow, being first duly sworn, deposes and says that she is the wife of B. A. Wendrow, a practicing attorney in the city of Mt. Pleasant, Michigan; that on Sunday, April 16, 1939, in the early part of the evening her husband stated to her, as he was leaving for his office, that he was expecting a long distance call from an attorney in Saginaw, Michigan, relative to a possible settlement of the Stevens' case; that at said time her husband requested her, in the event the call came while he was on his way to his office, to so notify the operator and have her call again in a few moments.

Deponent states that shortly thereafter, their telephone rang and she answered same and the operator stated that Saginaw was calling; that approximately at the same time her husband answered the telephone in his office

Affidavit of Margaret M. Wendrow

and while waiting for the operator to complete the call, her husband requested her to listen to the conversation, stating that she might hear some good news relative to a settlement of the Stevens case; that immediately thereafter, the party at the other end stated that his name was "Stanton"; that a brief conversation followed between said party "Stanton" and her husband, in which conversation said party "Stanton" stated that any settlement was off; that thereafter said party "Stanton" inquired as to whether deponent's husband still intended to go ahead with said matter; that her husband replied that they were going ahead with the case in the morning as soon as they were able, just as her husband's previous conversation with said "Stanton" had stated; that thereupon, the said party "Stanton" stated that he probably would come up in the morning for the hearing.

Deponent further states that she listened to and heard the whole of said conversation between said party "Stanton" and her husband; that at no time was there anything said about any agreement or promise to set aside a default, and that at no time during the said conversation did her husband state that he would not go through with any promise or agreement, but on the contrary, deponent states that the sum and substance of said conversation was as above related by her.

Further deponent sayeth not.

(Signed) Margaret M. Wendrow.

Subscribed and sworn to before me
this 28th day of April, 1939.

(Signed) Leo J. Mulholland,

Notary Public,

Isabella County, Mich.

My commission expires January 21, 1941.

*Affidavit***AFFIDAVIT.**

(Filed May 5, 1939.)

State of Michigan,
County of Saginaw—ss.

William E. Crane, being duly sworn, deposes and states that he is an attorney licensed to practice in the state of Michigan, and is a member of the firm of Crane & Crane, attorneys at law, with offices in the Second National Bank Building, Saginaw, Michigan.

Deponent further states that on December 1, 1938, Dr. Roy A. Northway of Mt. Pleasant, Michigan, came to the law offices of Crane & Crane and discussed a certain lawsuit started by one Frank Stevens against Dr. R. A. Northway, Dr. Roy B. Fisher, and Dr. Roy A. Northway, doing business as the Northway Hospital and Clinic. Deponent states that Dr. Northway informed him that he had a certain professional liability policy with the Metropolitan Casualty Insurance Company of New York and that he had relied on said insurance company to supply his legal defense and hold him harmless from any claim of damage in said suit. Deponent states that said Dr. Northway alleged that he had complied with the terms of said policy and notified the sales agent of said insurance company, one Edward J. Farrell, and that the Michigan manager for said insurance company, one H. J. Jeffery, had come from Detroit, Michigan, to the doctor's office at Mt. Pleasant, Michigan, and had assured the doctor that he was fully covered under the terms of said policy and that said insurance company expected said Dr. Northway and his assistant, Dr. Roy B. Fisher, to co-operate with said insurance company, and that said insurance company would at all times fully protect him from said claim and further in the event that further demands were placed upon him by said Frank Stevens that the said Dr. Northway should get in connection with the insurance company's attorneys, and particularly one H. Monroe Stanton at Saginaw, Michigan.

Deponent states that said Dr. Northway related that said Frank Stevens did make further claims on him and that said Dr. Northway did get in touch with the said

Affidavit

H. Monroe Stanton and that said H. Monroe Stanton did come to his offices in Mt. Pleasant, Michigan, and there took a statement from the said Frank Stevens which the said Frank Stevens refused to sign; and that said H. Monroe Stanton and said Frank Stevens had certain conversations relative to the settlement of the claim of said Frank Stevens.

Deponent further states that Dr. R. A. Northway related to this deponent that a suit was commenced and started against him in the Circuit Court for the County of Isabella by the said Frank Stevens as heretofore related; that Dr. Northway alleges that one Frederick J. Ward, attorney, of Detroit, Michigan, and H. Monroe Stanton, attorney, of Saginaw, Michigan, under the terms of said policy appeared of record for him and started to defend said lawsuit. Deponent states that Dr. Roy B. Fisher likewise employed the law firm of McNamara and Browning of Mt. Pleasant, Michigan.

This deponent further states that when the firm of Crane & Crane were retained by Dr. R. A. Northway and Dr. Roy B. Fisher, judgment had already been entered against said Doctors in favor of the said Frank Stevens in the Circuit Court for the County of Isabella and that both doctors complained bitterly to this deponent and the members of his firm relative to the conduct of the said Frederick J. Ward and H. Monroe Stanton acting for said doctors in the defense of said claim.

Deponent states that said Dr. Roy A. Northway stated that counsel for said insurance company had drafted and filed pleadings without consulting said Dr. Northway and refused to submit evidence in the trial which the said Dr. Northway had obtained and in general disregarded his rights in this matter. Deponent further states that said Dr. Roy B. Fisher had employed separate counsel to defend him and that his said firm of attorneys relied entirely on the attorneys for said insurance company and in fact merely copied the pleadings of the said attorneys for the insurance company as will appear by the records and files in this case.

Deponent further states that Dr. Roy A. Northway was not covered under the terms of the policy of insurance herein referred to for his operation of the Clinic and Hospital, so-called, and that said attorneys for the insur-

Affidavit

ance company alleged in the pleadings of the said Dr. Roy A. Northway, individually, that said Clinic and Hospital were solely responsible to said Frank Stevens and that said attorneys for the insurance company throughout the trial attempted to place the blame on said Clinic and Hospital which was excluded under the terms of the policy and did all this in violation of the instructions of the said Dr. Northway and without consultation with him. Deponent further states that Dr. Northway has advised him that in the principal suit brought by Frank Stevens against Dr. Northway and his assistant, Dr. Roy E. Fisher, and said Hospital and Clinic, which lasted for approximately ten days or more, that at the conclusion of the proofs the said Attorney Frederick J. Ward left the court room without arguing the case to the jury and left Dr. Northway without chief counsel, and that the conduct of the said Frederick J. Ward and the said H. Monroe Stanton was such as to greatly prejudice and injure the rights of the said Dr. R. A. Northway in his suit and that Dr. Northway gained the impression that the attorneys for the insurance company had so conducted themselves that their sole and only interest was an attempt to repudiate the duties of the said insurance company to the said Dr. Roy A. Northway under the terms of its said policy.

Deponent further states that the firm of Crane & Crane then appeared as personal attorneys for the said Doctors Roy A. Northway and Roy B. Fisher; that thereafter Frank Stevens, through his attorneys, had issued in a proper proceeding a garnishment action against The Metropolitan Casualty and Insurance Company of New York. Deponent states that the attorneys for said insurance company, Frederick J. Ward and H. Monroe Stanton, refused to recognize the jurisdiction of the Circuit Court for the County of Isabella, State of Michigan, and attempted to have the garnishment action removed to the United States District Court for the Eastern District of Michigan, Northern Division. Deponent further states that proper proceedings were taken in the United States District Court, aforesaid, and that the garnishment case was remanded back to the Circuit Court for the County of Isabella, State of Michigan, by order of the Honorable Arthur J. Tuttle on April 15, 1939. Deponent states that

Affidavit

at the hearing in the United States District Court, aforesaid, said H. Monroe Stanton, attorney, was present for said insurance company and argued against said motion. Deponent states that after the hearing on said motion, the said H. Monroe Stanton requested that the default of the insurance company for not appearing and not filing a disclosure in the state court be set aside. This deponent further states that he informed the said H. Monroe Stanton that the default had been entered by Frank Stevens and his attorneys and that any relief requested would have to come through the attorneys for the said Frank Stevens; deponent further stated to H. Monroe Stanton that he would not request the attorneys for said Frank Stevens to set aside said default for him. Deponent stated to said H. Monroe Stanton that from the attitude of the insurance company and the conduct of the said insurance company's attorneys toward said Dr. R. A. Northway and Dr. Roy B. Fisher as above related that this deponent did not feel that said insurance company or their attorneys were entitled to ask any favors. Deponent further informed said attorney that he had been advised by letter that default judgment would be entered on April 17, 1939, and that if said attorneys for said insurance company wanted any relief it was entirely up to them to appear in Mt. Pleasant, Michigan, at the courthouse, in the Circuit Court for the County of Isabella, State of Michigan, and make their requests to the court. Deponent further stated that he would be compelled to be present at said hearing in the state court on April 17th for Dr. R. A. Northway to give testimony in his possession.

Deponent states that on April 17, A. D. 1939, a hearing was had in the Circuit Court for the County of Isabella, State of Michigan, at the courthouse, and said judgment was entered and that after the entry of said judgment and while deponent was still in chambers of the Honorable Ray Hart, circuit judge, he received a telephone call from the said H. Monroe Stanton and that the said Honorable Ray Hart, circuit judge, informed said attorney that testimony had been taken and judgment entered in the garnishment action against The Metropolitan Casualty and Insurance Company of New York.

Deponent further states that thereafter the attorneys

Affidavit

for said insurance company filed a motion to set aside the default entered on April 17, A. D. 1939, and noticed the hearing before the Honorable Ray Hart, circuit judge, on April 24, A. D. 1939. Deponent states that he made the trip to Mt. Pleasant, Michigan, on April 24, A. D. 1939, and went to the offices of Dr. R. A. Northway. Deponent states that while he was in the offices of the said Dr. Roy A. Northway, Mr. H. Monroe Stanton, attorney, came to said offices and this deponent then informed the attorney for said insurance company, Mr. H. Monroe Stanton, that the Honorable Ray Hart, circuit judge, was not in Mt. Pleasant, Michigan, and that the hearing would have to be adjourned. Deponent states that at said time said H. Monroe Stanton again requested this deponent to exercise his offices in requesting B. A. Wendrow, attorney for Frank Stevens, to set aside the default heretofore entered. Deponent further states that he again refused to intervene for said H. Monroe Stanton and request the said Frank Stevens and his attorney, B. A. Wendrow, to set aside said default.

Deponent further states that Dr. Roy A. Northway later came to him and stated that Mr. H. Monroe Stanton had requested him to intervene and request the said Frank Stevens and his attorney, B. A. Wendrow, to set aside said default and that Dr. Northway had informed the said Attorney Stanton that he would not grant his request.

Deponent further states that at no time during his connection with the above litigation did he hear of any agreement made by the said B. A. Wendrow or his client, Frank Stevens, to set aside the default entered in this case and deponent verily believes that no such agreement was ever made or that there was any likelihood of such an agreement due to the facts as hereinbefore related.

Further deponent saith not.

(Signed) William E. Crane.

Subscribed and sworn to before me,
a notary public in and for said county,
this 3rd day of May, A. D. 1939.

(Signed) Gertrude L. Smalling,

Notary Public,

Saginaw County, Mich.

My commission expires March 22, 1940.

*Affidavit***AFFIDAVIT.**

(Filed May 5, 1939.)

State of Michigan,
County of Saginaw—ss.

Henry E. Naegely, Jr., being duly sworn, deposes and says that he is associated with the firm of Crane & Crane in Saginaw, Michigan; that he has been interested in the within cause; that he was present at the United States District Court in Bay City on Saturday, April 15, A. D. 1939; that after the hearing on the motion to remand he accompanied plaintiff's attorney, B. A. Wendrow, to the anteroom adjoining the court room; that H. Monroe Stanton, one of the attorneys for the garnishee defendant, was also present in said anteroom and that deponent waited for said B. A. Wendrow to finish conversing with the said H. Monroe Stanton before leaving the building.

Deponent states that during the conversation referred to this deponent was present part of the time and was in the court room part of the time; that within a short space of time deponent left the Federal Building in company with Attorney B. A. Wendrow and discussed the import of the conversation had between said B. A. Wendrow and Attorney Stanton; that deponent, B. A. Wendrow and William E. Crane then proceeded to dine together and that during said period the conversation between the said Stanton and Attorney Wendrow was discussed by the parties present.

Deponent further states that he has read the second and third paragraphs of an affidavit made by Attorney B. A. Wendrow, dated April 27, A. D. 1939, and executed by him and this deponent avers that the same is true to the best of his knowledge and belief; that at no time during his conversations with the said Attorney Wendrow, on said day or at any time thereafter did any statement that the said Wendrow had agreed to set aside a default arise.

Deponent further states that during none of the conversations had in his presence with or without the presence of Attorney Stanton was there any promise or ad-

Order Denying Motion to Set Aside Default

mission of a promise to set aside a default made by said B. A. Wendrow. Deponent further states that at no time since the 15th day of April, A. D. 1939, it has ever been expressed or implied that there was any agreement to set aside a default until the said H. Monroe Stanton made such claim in the Circuit Court for the County of Isabella on April 24, A. D. 1939.

Further deponent saith not.

(Signed) Henry E. Naegely, Jr.

Subscribed and sworn to before me, a notary public in and for said county, this 3rd day of May, A. D. 1939.

(Signed) Gertrude L. Smalling,

Notary Public,

Saginaw County, Mich.

My commission expires March 22, 1940.

**ORDER DENYING MOTION TO SET ASIDE
DEFAULT.**

(Filed May 3, 1939.)

(Title of Court and Cause.)

At a session of said court held at the courthouse in the city of Midland, Michigan, on this 27th day of April, A. D. 1939.

Present: The Honorable Ray Hart, circuit judge.

In this cause The Metropolitan Casualty Insurance Company of New York, a corporation, garnishee defendant, by Frederick J. Ward and H. Monroe Stanton, its attorneys, having on the 18th day of April, A. D.

Order Denying Motion to Set Aside Default

1939, filed a motion to set aside the default entered by plaintiff on the 17th day of April, A. D. 1939, and the said plaintiff, Frank Stevens, having filed his answer in opposition thereto, and the said garnishee defendant being present in court by H. Monroe Stanton, one of its attorneys, and the plaintiff being present in court by B. A. Wendrow, one of his attorneys and the principal defendants being present in court by Crane & Crane and Henry E. Naegely, Jr., their attorneys, and the court having heard the arguments of counsel on behalf of said parties, and it appearing that the attorneys now representing the garnishee defendant formerly represented the principal defendants during the trial of the principal suit, and the court having heretofore entered judgment on proper hearing against the garnishee defendant, and it further appearing that the default of the garnishee defendant had been heretofore properly and regularly entered against the garnishee defendant and judgment properly entered on default against said garnishee defendant, and it further appearing that the garnishee defendant has failed to properly protect its rights in this court by appearing or filing a disclosure within the time allotted by law and the rules of the court, and it further appearing that said garnishee defendant has shown no valid reason to support its motion, and it further appearing that said garnishee defendant has failed to show a meritorious defense so that justice would require a revision of said decision and judgment heretofore rendered, and the court being fully advised in the premises,

It is hereby ordered that the motion to set aside the default of April 17, A. D. 1939, made and filed by the garnishee defendant herein, be and the same hereby is denied with costs to the plaintiff;

It is further ordered, that the garnishee defendant having on the trial hereof filed an amended motion and affidavit by H. Monroe Stanton in support thereof and the plaintiff having on this hearing denied the allegations contained in said amendments and having denied the statements made in the affidavit of H. Monroe Stanton in open court, that plaintiff, by his attorneys, be

Hearing on Motion to Set Aside Default

given leave to file formal answer to said amendments and said affidavit of H. Monroe Stanton.

(Signed) Ray Hart,
Circuit Judge.

Countersigned:

(Signed) Hugh D. Johnson,
Clerk.

**HEARING ON MOTION TO SET ASIDE
DEFAULT.**

(Title of Court and Cause.)

At a session of said court held at the courthouse in the city of Midland, April 27th, 1939:

Present, Hon. Ray Hart, circuit judge.

Appearances:

B. A. Wendrow, Attorney at Law, Mt. Pleasant,
Michigan,
For Plaintiff.

Crane & Crane, represented by Henry Naegely,
Attorney at Law, Saginaw, Michigan,
For Principal Defendants.

H. Monroe Stanton, Attorney at Law, Bearinger
Building, Saginaw, Michigan,
For Garnishee Defendant.

The Court: I will say, gentlemen, in this matter, motion to set aside default in this case, the case was tried last fall, along in November and judgment was rendered on the verdict of the jury for the plaintiff.

Hearing on Motion to Set Aside Default

and against the principal defendants. They were at that time represented by the attorneys who are now representing the garnishee defendant, the Metropolitan Casualty Insurance Company, of New York.

The court files in this court show that on March 8th proceedings were taken by the plaintiff against the defendant insurance company, as garnishee defendant, and a disclosure was not made by the garnishee defendant within the time fixed by the rules of the court, to-wit, Sec. 5 of Rule 27 of the Michigan Court Rules. In the writ it is ordered, and agreed between the attorneys that the writ stated the return should be made within fifteen days. Is that the language?

Mr. Wendrow: No. On the 31st day of March.

The Court: On the 31st day of March.

Mr. Wendrow: 21 days.

The Court: Twenty-one days, but that time went along and finally default was taken in the 11th day of April, 1939, by the plaintiff in the case, and afterwards—affidavit was filed and default taken on April 17th.

Now, the garnishee undertook to take such proceedings as would be necessary to remove the case, so far as they were concerned, at least, to the federal court. That motion was made in this court and denied, and then on the claim that the court didn't have to sign a transfer of the case to the federal court, it was taken to the federal court, where a motion was made to remand the matter to the circuit court, that is, this court, and the federal court decided that this court had jurisdiction of the matter and remanded the case.

Default having been taken in the case against the defendant judgment was entered on the—

Mr. Wendrow: 17th.

The Court: 17th day of April, 1939, against the garnishee defendant. From the citations of the cases made during the arguments in this court at this hearing it would seem that the law is pretty well settled upon the question,—anyway the cases called to the attention of the court, that the defendant insurance company did not protect their rights in the case in the matter of the appeal, and the matter of having the case remanded to the federal court.

Hearing on Motion to Set Aside Default

Mr. Wendrow: You mean removed?

The Court: Yes. The federal court after the hearing remanded the matter to this court, and stated this court had full jurisdiction of the matter.

No answer has been filed by the defendant insurance company or any disclosure made up to that time, although the insurance company did file a disclosure in federal court, a claimed disclosure, and their motion to set aside the default entered against the garnishee defendant in this court contains a copy of the disclosure. That was not filed in this court,—the disclosure was not filed in this court.

The disclosure should have been filed in this court as I look at it, and a motion to set aside the default. The fact that it was filed in the federal court, with the decisions cited, would not affect the matter in this court, and no disclosure was filed, with the motion to set aside the default. It appears to the court that a disclosure should have been filed with the motion to set aside the default and—

Mr. Stanton: Might I interrupt?

The Court: And I believe from the decisions that have been cited here they hold that by making a motion to take it to the federal court is nothing more than a special appearance. That special appearance was taken up in federal court and the case was remanded to the circuit court, this court.

Mr. Stanton: If I might interrupt, we have a disclosure prepared at this time and I am willing to tender it to the court and the attorneys.

The Court: It would have been a very good thing if it had been entered and filed before the motion was made. I think that would be the proper practice, not filed at this time. For those reasons I think the court is constrained, therefor, to deny the motion to set aside the default. Now, there has been an amendment made to the motion filed by the garnishee defendant, and from the argument of counsel there appeared to be some contention as to some affidavit filed. If either one of counsel wants to file an answer to the affidavit they may have that privilege.

Claim of Appeal

Mr. Wendrow: Your honor, I want that privilege.
I—

The Court: I have given you that privilege and that is all there is to it. I have filed this amended motion, marked it in lead pencil filed 4/27/39, and have the clerk file it up there as of this date.

State of Michigan,
County of Midland—ss.

I hereby certify that I am the official court reporter of the 21st Judicial Circuit of Michigan, comprising the counties of Midland, Isabella and Clare; that the above and foregoing is a complete, true and correct transcript of a hearing in said above entitled cause on this day.

Dated: April 27th, 1939.

Winifred Post Dudd,
Official Court Reporter,
21st Judicial Circuit of
Michigan.

Business Address:
Courthouse,
Midland, Michigan.

CLAIM OF APPEAL.

(Filed May 1, 1939.)

(Title of Court and Cause.)

The Metropolitan Casualty Insurance Company of New York, a foreign corporation, garnishee defendant, claims an appeal from the default judgment entered

Notice

April 17th, 1939, by the Circuit Court for the County of Isabella, state of Michigan, and from said court's order and opinion of April 27th, 1939, denying said garnishee defendant's motion to set aside said default judgment, filed April 18th, 1939.

Appellant takes a general appeal.

Dated: May 1st, A. D. 1939.

Frederick J. Ward,
H. Monroe Stanton,
Attorneys for Appellant.

Business Address:

1117 Dime Building,
Detroit, Michigan.

NOTICE.

(Filed May 1, 1939.)

(Title of Court and Cause.)

To:

B. A. Wendrow, Attorney for Plaintiff, Mount Pleasant, Michigan:

McNamara & Browning, Mount Pleasant, Michigan:

Crane & Crane, Second National Bank building, Saginaw, Michigan, attorneys for R. A. Northway, doing business under the assumed name of Northway Clinic and Hospital, and R. A. Northway, and Roy B. Fisher:

Please take notice that attached hereto is a true copy of appeal bond, heretofore filed in the above entitled cause, and that on Saturday, May 6th, 1939, at 9:30

Appeal Bond

o'clock in the morning, or as soon thereafter as counsel may conveniently be heard, the original of said appeal bond will be submitted to the court for approval, at the courthouse in the city of Mt. Pleasant, county of Isabella, state of Michigan.

H. Monroe Stanton,
Attorney for Garnishee
Defendant.

Business Address:
514 Beringer Building,
Saginaw, Michigan.
Dated: May 1st, A. D. 1939.

APPEAL BOND.

(Filed May 1, 1939.)

(Title of Court and Cause.)

Know all men by these presents, that we, The Metropolitan Casualty Insurance Company of New York, a foreign corporation, as principal, and Commercial Casualty Insurance Company, as surety, are held and firmly bound unto Frank Stevens, in the sum of twenty-one thousand and 00/100 dollars (\$21,000.00), good and lawful money of the United States of America, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators and successors, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 28th day of April, 1939.

Whereas, lately at a session of the Circuit Court for the County of Isabella, State of Michigan, in a suit

Appeal Bond

pending to said court in which Frank Stevens was plaintiff and The Metropolitan Casualty Insurance Company of New York, a foreign corporation, was garnishee defendant, a final judgment was rendered against the said Metropolitan Casualty Insurance Company of New York, a foreign corporation, for the sum of ten thousand four hundred eighteen dollars and thirty cents (\$10,418.30) damages and costs of suit to be taxed, and the said garnishee defendant, The Metropolitan Casualty Insurance Company of New York, a foreign corporation, having appealed therefrom to the Supreme Court of the State of Michigan.

Now, the condition of the above obligation is such that if the said The Metropolitan Casualty Insurance Company of New York, a foreign corporation, shall prosecute its said appeal to effect, and shall pay and satisfy such judgment as shall be rendered against it thereon, then the above obligation to be void, otherwise to remain in full force and virtue.

The Metropolitan Casualty Insurance Company of New York, a foreign corporation,

Per H. A. Davidson,

Manager.

Commercial Casualty Insurance Company,

Per L. E. Hodges,

Attorney in Fact.

(Seal.)

Motion to Strike

MOTION TO STRIKE.

(Filed May 20, 1939.)

(Title of Court and Cause.)

Now comes the above named garnishee defendant, The Metropolitan Casualty Insurance Company of New York, a foreign corporation, and moves the court now here to strike from the records in this cause affidavits in support of the answer to amendment to motion to set aside default, filed on behalf of the plaintiff herein, or so much of said affidavit as is based on hearsay, or so much of said affidavit as is incompetent, irrelevant and immaterial, for the following reasons:

1. That the affidavit of B. A. Wendrow recites an allegation regarding a conversation about a proposed settlement which is immaterial to the issue involved herein.

2. That said affidavit contains the substance of a conversation held between B. A. Wendrow, William E. Crane, and Henry Naegely, in the absence of any representative of the garnishee defendant, and that said allegation is incompetent.

3. That said affidavit contains certain allegations regarding a conversation between the said B. A. Wendrow and his wife, in the absence of any representative of the garnishee defendant herein, and that said statements are irrelevant to the issue involved herein and are incompetent.

4. That the only time the parties hereto have entered into any stipulation, as set forth in paragraph 6 of the affidavit of B. A. Wendrow, was regarding the principal case, and said stipulations were signed merely because Judge Hart was not available at the time certain motions were to be heard, and agreements were entered into in writing to extend the time in which said motion could be heard.

5. That it will appear from the files and records in this cause that the motion to remove said cause of action to the federal court was adjourned to a date other than the date already set, upon verbal agreement of the parties hereto and the circuit court, and it will further

Motion to Strike

appear from the records and files in this cause that the motion to set aside the default was heard at a later date than had been set by verbal agreements of the parties hereto.

6. That the affidavit of Dr. R. A. Northway, filed herein, in support of the aforementioned motion, is entirely irrelevant to the issues herein involved, and incompetent.

7. That the affidavit of William E. Crane, filed herein, is based entirely on hearsay, and concerns conversations between himself and Dr. R. A. Northway, in the absence of any representative of the garnishee defendant herein, and that the remainder of the allegations set forth in said affidavit are immaterial to the issues herein involved.

8. That the contents of the affidavit of Henry E. Naegely, filed in support of the aforesaid motion, concern principally a conversation held in the absence of any representative of the garnishee defendant herein.

This motion is based upon the files and records in this cause, and the affidavit of H. Monroe Stanton, attached hereto.

(Signed) H. Monroe Stanton,
Attorney for Garnishee
Defendant.

Business Address:
514 Bearinger Building,
Saginaw, Michigan.

Dated: May 13th, A. D. 1939.

*Affidavit in Support of Motion to Strike***AFFIDAVIT IN SUPPORT OF MOTION TO STRIKE.**

(Filed May 20, 1939.)

(Title of Court and Cause.)

State of Michigan,
County of Saginaw—ss.

H. Monroe Stanton, being duly sworn, deposes and says that he is an attorney at law, and the attorney of counsel for the garnishee defendant herein.

Deponent further states that on several occasions, B. A. Wendrow, the attorney for the plaintiff herein, attempted to discuss the matter of settlement with your deponent, but that your deponent has consistently informed said B. A. Wendrow that he had nothing to do with settlement of said matter, but that the matter of settlement was entirely in the hands of Mr. Frederick J. Ward.

Deponent further states that some time after the trial held herein, he was informed by Mr. McNamara, former attorney for the principal defendants, that said case could have been settled for \$2,000.00 or \$3,000.00, before trial, and that your deponent has always expressed the opinion, and, possibly, did express the opinion to said B. A. Wendrow that the case should have been settled by Dr. Northway at that time.

Deponent further states that he was not present when a conversation was held between B. A. Wendrow, William E. Crane, and Henry E. Naegely, on April 15, 1939, after the hearing was held in the federal court.

Deponent further states that it was impossible to prepare a stipulation at the time of the hearing in the federal court, because the parties did not have the material at hand, with which to prepare a stipulation, and for the further reason that it was necessary for your deponent to consult with Mr. Frederick J. Ward before entering into any agreements of any kind with any of the parties hereto.

Deponent further states that he was not present and did not hear any conversation whatsoever, either on the

Affidavit in Support of Motion to Strike

telephone or otherwise, between the said B. A. Wendrow and his wife.

Deponent further states that on April 24, 1939, he was in the office of Dr. R. A. Northway, but was there solely for the purpose of obtaining certain information, regarding injuries sustained by a man by the name of Francis Marion Cargill, which has nothing whatever to do with this case, and that while deponent was in the doctor's office at said time, said doctor insisted on discussing the above cause, and that said doctor at said time and place went to great lengths in explaining to your deponent the incompetency of his former attorney, Mr. McNamara, and also the incompetency of Mr. Frederick J. Ward. Your deponent further states that it was not his desire to get into any argument or discussion with the doctor, regarding the above entitled cause, and did not discuss the matter with him.

Deponent further states that while he was in the doctor's office, Mr. William E. Crane, came into said office, and your deponent did suggest to Mr. Crane that it would be a nice gesture on his part if he would intervene and suggest to Mr. Wendrow that the default filed herein be voluntarily set aside, but that Mr. Crane stated, that he had no control over the situation and would not interfere.

Deponent further states that neither he nor anyone representing the garnishee defendant herein was present during the time the alleged conversations took place between William E. Crane and Dr. Northway, as set forth in the affidavit of William E. Crane, and further states that any information that said Dr. Northway may have given Mr. Crane during the relationship of attorney and client is confidential and privileged, and that your deponent knows of no time that said privilege has been waived by Dr. Northway.

Deponent further states that on the morning the default judgment was taken herein, your deponent attempted to contact Judge Hart by telephone, because he had heard that a default was going to be taken on that morning, but that your deponent was familiar with the fact that Judge Hart was very seldom in Mt. Pleasant, because he has three circuits to take care of, and your

Answer to Motion to Strike

deponent did not care to make an unnecessary trip to Mt. Pleasant, if the judge was not going to be there, and that inasmuch as the judge could not be reached on telephone, your deponent assumed that he would not be present on that day, but that along towards noon, on April 17, 1939, Judge Hart did answer the telephone and informed your deponent that judgment had already been taken.

(Signed) H. Monroe Stanton.

Subscribed and sworn to before me
this 13th day of May, A. D. 1939.

(Signed) Ruth K. Block,

Notary Public,

Saginaw County, Michigan.

My commission expires: 7/14/42.

ANSWER TO MOTION TO STRIKE.

(Filed May 27, 1939.)

(Title of Court and Cause.)

Now comes Frank Stevens, the above named plaintiff, and in answer to the motion heretofore filed by the above named garnishee defendants to strike from the records on this cause certain affidavits or portions thereof in support of plaintiff's answer to amendments to motion to set aside default, says:

1. Answering paragraph 1, plaintiff denies that the recitation by plaintiff's attorney as therein alleged, is immaterial, for the reason that same merely reiterates the answer made by plaintiff's attorney in open court on April 27, 1939, and for the further reason

Answer to Motion to Strike

that same was made in response to the question asked by said garnishee defendant's attorney in open court at said time, at which time the said attorney, H. Monroe Stanton, requested plaintiff's attorney to state said conversation in question. Further answering, plaintiff shows that said allegations are material in that they refute the allegations made by said garnishee defendant's attorney, H. Monroe Stanton.

2. Answering paragraph 2, plaintiff denies that such allegations are incompetent for the reason that same refute and are material and competent evidence to refute the allegations of the said garnishee defendant's attorney, H. Monroe Stanton.

3. Answering paragraph 3, plaintiff denies that such conversation was in the absence of a representative of the garnishee defendant; for the reason that the said H. Monroe Stanton, one of the attorneys for said garnishee defendant, took part in said conversation at said time and place; further answering, plaintiff denies that such statements are not relevant for the reason that same directly refute and are material and competent evidence in denial of the allegations made by said garnishee defendant's attorney, H. Monroe Stanton.

4. Answering paragraph 4, plaintiff avers that the allegations therein are not irrelevant to support said motion to strike; further answering same denies that any such stipulations were necessary, for the reason that under the rules and practice of said court, any such hearings were automatically adjourned in the event the circuit judge was absent at the time set for such hearings.

5. Answering paragraph 5, plaintiff avers that said allegations are not irrelevant in support of said garnishee defendant's motion to strike; further answering, plaintiff denies there was any such verbal agreement as alleged, but admits that certain of said hearings were adjourned because of the absence of the circuit judge at the time set for the hearings, but shows that such matters were adjourned automatically under the rules and practice of said court.

6. Answering paragraph 6, plaintiff denies the same for the reason that the allegations of said Dr. R. A. Northway are material and competent evidence to refute

Answer to Motion to Strike

the allegations made by said garnishee defendant's attorney, H. Monroe Stanton.

7. Answering paragraph 7, plaintiff denies the same for the reason that H. Monroe Stanton, one of the attorneys for said garnishee defendant, was present at various conversations in which the said Dr. R. A. Northway charged the said H. Monroe Stanton with failing to properly represent his interests in the principal suit and charged said H. Monroe Stanton and Frederick J. Ward with unethical and improper legal representation, as set forth in detail in the said affidavit of William E. Crane.

8. Answering paragraph 8, plaintiff denies the same for the reason that said Henry E. Naegely heard such conversation and for the further reason that the allegations contained in said affidavit are material and competent to refute the allegations made by the said garnishee defendant's attorney, H. Monroe Stanton.

This answer is based upon the files and records in this cause and affidavit of B. A. Wendrow attached hereto.

(Signed) B. A. Wendrow.

(Signed) Worcester & Worcester.

Business Address:

Commercial Building,
Mt. Pleasant, Michigan.

Affidavit in Support of Answer to Motion to Strike

**AFFIDAVIT IN SUPPORT OF ANSWER TO
MOTION TO STRIKE.**

(Filed May 27, 1939.)

State of Michigan,
County of Isabella—ss.

B. A. Wendrow, being first duly sworn, deposes and says that he is one of the attorneys for Frank Stevens, the above named plaintiff, and that he makes this affidavit in answer to the affidavit heretofore made and filed by H. Monroe Stanton in support of the said garnishee defendant's motion to strike.

Answering said affidavit categorically, deponent denies that on several occasions he attempted to discuss the matter of settlement with H. Monroe Stanton and denies that said H. Monroe Stanton consistently informed deponent that he had nothing to do with the settlement of said matter, but deponent does admit that the said H. Monroe Stanton had discussed a settlement of said matters on various occasions with deponent, and shows, on the contrary, that the said H. Monroe Stanton, as the attorney for said garnishee defendant has on several occasions attempted to settle said cause and avers that immediately after the said H. Monroe Stanton had interviewed the said Frank Stevens and expressed his willingness to settle said Stevens' claim, and learned that he was represented by this deponent, that the said H. Monroe Stanton came to deponent and advised him that the said Frank Stevens was asking for \$20,000, but that he, the said H. Monroe Stanton, would not advise his client to pay that much money; deponent further shows that later as he is informed and believes, the said H. Monroe Stanton did make an offer to James E. Ryan, an attorney associated with deponent in said cause, in a very substantial sum in full settlement of said cause, said offer being made on behalf of said garnishee defendant insurance company.

Further answering said affidavit, deponent questions the truth and value of such information as said H. Monroe Stanton claims to have been obtained from Mr. Me-

Affidavit in Support of Answer to Motion to Strike

Namara, for the reason that the said H. Monroe Stanton had theretofore made a much more substantial offer in settlement and for the further reason that no such offer was ever made by plaintiff or his attorney; further answering, deponent admits that the said H. Monroe Stanton did on several occasions express his opinion to deponent that said case should have been settled, and avers as aforesaid that said H. Monroe Stanton on behalf of said garnishee defendant insurance company, did discuss the settlement of same.

Further answering deponent denies that it was impossible to prepare a stipulation at the time of the hearing in Federal Court for the reason that any number of typewriters in said offices in said building were available and further answering, avers that there was no conversation whatever between this deponent and H. Monroe Stanton relative to a stipulation, but on the contrary deponent avers that said H. Monroe Stanton discussed the settlement offer, concerning which he agreed to contact Mr. Ward and to notify deponent as to such offer, all of which has been previously alleged by this deponent.

Further answering said affidavit this deponent says in regard to the conversation between the said H. Monroe Stanton and this deponent, that this deponent's wife was listening in on an extension telephone and heard the entire conversation, as more fully has been previously alleged.

Deponent further says that said H. Monroe Stanton had received due and timely notice that plaintiff's attorneys would offer proofs on said 17th day of April, 1939, in support of judgment as has more fully been set forth in an affidavit heretofore filed in this court in this cause; that the court deferred taking any proofs in said cause until ten o'clock in the forenoon of said day awaiting the appearance of the attorneys for said garnishee defendant; that when it became evident that said attorneys did not intend to appear, proofs were offered and judgment taken; that this deponent was in the chambers of said Honorable Ray Hart, circuit judge, at approximately ten-twenty-five (10:25) o'clock in the forenoon of said day when said H. Monroe Stanton

Motion to Strike

called said judge on the telephone and was informed by the judge that judgment had been rendered in said cause; that said Honorable Ray Hart had been in his chambers and in and about the court room continuously between the hour of nine and ten o'clock in the forenoon of said day.

(Signed) B. A. Wendrow.

Subscribed and sworn to before me
this 20th day of May, A. D. 1939.

(Signed) Leo J. Mulholland.

My commission expires Jan. 21, 1941.

MOTION TO STRIKE.

(Filed May 20, 1939.)

(Title of Court and Cause.)

Now comes the above plaintiff, Frank Stevens, by his attorneys, B. A. Wendrow and Worcester & Worcester, and moves the court now here to strike from the files and records of this court and cause, the purported disclosure, or copy of same, of the garnishee defendant made and filed in the District Court of the United States for the Eastern District of Michigan, Northern Division, and also to strike the appearance, or copy of same, of said garnishee defendant made and filed in said Federal Court, for the following reasons:

1. That same forms no part of the files of this court.
2. That the said District Court of the United States for the Eastern District of Michigan, Northern Division, had no jurisdiction of said cause, at the time said

Affidavit

papers were filed in said Federal Court, as was decided by said Federal Court.

3. That said attempted and purported appearance and disclosure therein were and are void and of no force and effect.

4. That on the 15th day of April, A. D. 1939, said District Court, heretofore mentioned, made a valid order remanding said cause to the Circuit Court for the County of Isabella.

This motion is based upon the files and records of this court and this cause and upon the affidavit of B. A. Wendrow hereto attached.

Dated this 20th day of May, A. D. 1939.

(Signed) B. A. Wendrow,

(Signed) Worcester & Worcester,
Attorneys for Plaintiff.

Business Address:

Commercial Building,
Mt. Pleasant, Michigan.

AFFIDAVIT.

(Filed May 20, 1939.)

(Title of Court and Cause.)

State of Michigan,
County of Isabella—ss.

B. A. Wendrow, being first duly sworn, deposes and says that he is one of the attorneys for Frank Stevens, plaintiff in the above entitled cause; that he has examined the files and records in the above entitled cause in the county clerk's office for the county of Isabella; that in

Affidavit

said file, he found a paper entitled, "Special Appearance and Motion to Set Aside Default" executed by H. Monroe Stanton, attorney for the above named garnishee defendant, which paper was filed April 16, 1939, and which paper recited that on the 10th day of April, 1939, the above garnishee defendant filed a disclosure in the United States District Court for the Eastern District of Michigan, Northern Division, and a notice of appearance in said Federal District Court; that said disclosure and notice of appearance were and are entitled in the said Federal District Court; that prior to said 10th day of April, A. D. 1939, the said garnishee defendant claimed to have transferred the above entitled cause from the Circuit Court for the County of Isabella to the aforesaid Federal District Court in Bay City; that on April 15, A. D. 1939, the plaintiff and the principal defendants in the above entitled cause, through their attorneys, moved the said Federal Court for an order to remand the said cause from the said Federal District Court to the Circuit Court for the County of Isabella; that on the said 15th day of April, A. D. 1939, said United States Federal District Court, by the Honorable Arthur J. Tuttle, made and executed an order to remand said cause, as requested, for the reason that said Federal District Court had no jurisdiction in said matter, which order was filed in this court and cause on April 17, 1939; that deponent finds that on the 18th day of April, A. D. 1939, the said garnishee defendant filed a purported copy of the above described disclosure and notice of appearance, which was entitled in said Federal District Court and which allegedly had been filed in said Federal District Court, which two above described papers the plaintiff has moved to strike; were attached to the said pleading entitled, "Special Appearance and Motion to Set Aside Default" which was filed in this court and cause on said date.

(Signed) B. A. Wendrow.

Subscribed and sworn to before me
this 20th day of May, A. D. 1939.

(Signed) Leo J. Mulholland,

Notary Public,

Isabella County, Mich.

My commission expires Jan. 21, 1941.

*Order Denying Plaintiff's Motion to Strike and Order
Adjourning Motion to Settle the Record*

**ORDER DENYING PLAINTIFF'S MOTION TO
STRIKE AND ORDER ADJOURNING
MOTION TO SETTLE THE
RECORD.**

(Filed June 12, 1939.)

(Title of Court and Cause.)

At a session of said court, held in the courthouse, in the city of Midland, county of Midland, this 29th day of May, A. D. 1939.

Present: Honorable Ray Hart, circuit judge.

Upon reading and filing plaintiff's motion to strike heretofore filed in the above entitled cause, and on hearing argument of counsel, in connection with said motion, and it appearing to the court that said motion is not well founded, and that the plaintiff is asking to have stricken from the records the evidence upon which the motion to strike is based.

It is ordered that said motion to strike, filed by the plaintiff herein, be, and the same is hereby denied.

It is further ordered that the motion to settle the record, heretofore filed in the above entitled cause, which was adjourned until June 2, be, and the same is hereby adjourned until June 23, 1939, at 9:30 in the morning, said motion to be heard at the courthouse, in Midland, Michigan.

(Signed) Ray Hart,
Circuit Judge.

*Order Denying Garnishee Defendant's Motion to Strike—
Opinion*

**ORDER DENYING GARNISHEE DEFENDANT'S
MOTION TO STRIKE.**

(Filed June 12, 1939.)

(Title of Court and Cause.)

At a session of said court, held in the courthouse in the city of Midland, county of Midland, state of Michigan, this 29th day of May, A. D. 1939.

Present: Hon. Ray Hart, circuit judge.

Upon reading and filing the said garnishee defendant's motion to strike heretofore filed in the above entitled cause, and upon hearing arguments of counsel for the respective parties in connection with said motion, and after due consideration thereof, it appearing to the court that said motion is not well founded, that said garnishee defendant is asking to have stricken from the records the evidence upon which the answer of plaintiff to said garnishee defendant's motion to set aside default judgment is based.

It is hereby ordered that the said garnishee defendant's motion to strike, heretofore filed, be, and the same is hereby denied.

(Signed) Ray Hart,
Circuit Judge.

OPINION.

(Filed June 21, 1939.)

(Title of Court and Cause.)

The garnishee defendant has moved to strike from the records of this cause affidavits in support of the

Opinion

answer to the amendment to the motion to set aside default heretofore entered on behalf of the plaintiff, or so much of said affidavits as are based on hearsay or which are incompetent, immaterial and irrelevant. The plaintiff later filed a motion to strike from the files and records of this court the purported disclosure, or the copy of the same, of the garnishee defendant, made and filed in the District Court of the United States for the Eastern District of Michigan, Northern Division, and also to strike the appearance and the copy of the same, of the garnishee defendant, made and filed in said Federal Court.

It appears in this cause that at that time the plaintiffs, who had received a judgment against the principal defendants, had commenced proceedings to collect from the garnishee defendant, the Metropolitan Casualty Insurance Company of New York, in this court. The garnishee defendants, however, had petitioned the District Court of the United States for the Eastern District of Michigan, Northern Division, for an order to remand the cause to that court. At the time the petition was presented to this court, ex parte, the court refused to sign the order, after which a hearing was had in open court and the court again refused to sign the order, giving his reasons therefor in open court, and which are contained in the record. The files show that a hearing was had to remand said cause to the Federal Court, but the court denies the petition and remanded the cause back to the circuit court, this court, for trial.

Judgment was entered in this court against the garnishee defendant for the amount of the judgment of the plaintiff against the principal defendants on the 17th day of April, 1939, at the city of Mt. Pleasant. The garnishee defendant has now moved to set aside the default entered in said cause by the plaintiff against the garnishee defendant. This motion has been denied for the reasons stated on the record.

The garnishee defendant now desires to strike from the record the affidavits in support of the answer to the motion to set aside the default. This is based upon the affidavit of H. Monroe Stanton, for the garnishee

Opinion

defendants, in said cause and counter affidavits have been filed in this cause by attorneys for the plaintiff, and it is these affidavits that the attorneys for the garnishee defendant desire to strike from the record. Plaintiff also moves that the papers filed by the garnishee defendant in this court relative to transferring the cause to the said United States Court be stricken from the files, with the appearance, and copies of the same, of the garnishee defendant, for the reason that the United States District Court had no jurisdiction of said cause at the time said papers were filed in said Federal Court, and which was so decided by said court, for the reason that the attempted or purported appearance and disclosure therein were and are void and of no force and effect and for the further reason that on the 15th day of April, 1939, the said United States Court made an order remanding said cause to this court.

The two motions were heard together.

Insofar as the motion of the garnishee defendant is concerned, relative to the affidavits of B. A. Wendrow, the court will say that there are some things in the affidavit that the court considers irrelevant and immaterial, and there are other matters set forth that are material and relevant to the question before the court. These affidavits relate mostly to the question of setting aside the default heretofore entered herein. It is a matter entirely for the court to decide and the court has only considered that part of the affidavit which is material and relevant to the contention of the parties. In regard to the motion to strike the affidavit of Mrs. Margaret H. Wendrow, the court finds that there is one paragraph in her affidavit, to-wit, the second paragraph, that would be material to the question at issue. Relative to the affidavit of R. A. Northway, the matter in the second paragraph of his affidavit, and in the third paragraph of his affidavit are material matters. In addition to the above affidavits, William E. Crane of the law firm of Crane and Crane, of Saginaw, makes an affidavit as attorney for Dr. R. A. Northway and Dr. Roy B. Fisher at the present time. Much of this affidavit does not relate to the question at issue. However, on the third page of his affidavit, about the middle

Opinion

of the page, are material things set up in contradiction of the affidavit of the attorney for the garnishee defendant therefore that paragraph would be material and should stand. The said affidavit of W. E. Crane consists principally of what his client, Dr. R. A. Northway told him at the time the said firm of Crane and Crane was retained to represent the said Northway in this cause, and, as stated before, contradictory to the affidavits filed by H. Monroe Stanton, an attorney, for the garnishee defendant, and which is material to the matter of notice of hearing the cause before the court on April 17, 1939, at Mt. Pleasant, Michigan. As to the affidavit of Henry E. Naegely the court is of the opinion that should be stricken from the record.

The court should say in this matter that the circuit judge of this circuit has been available in this court practically all the time for two or three years except from February 20th to March 4, 1939, and also from April 24th to May 6th, 1939; that this circuit consists of three counties, and the court has been available in one of the three counties at any and all times for attorneys having matters before said court and the attorneys always have notice when the court is to be held in any one of the counties of said circuit.

The court is further of the opinion that the court had jurisdiction of this cause from the very first and that the motion and petition to transfer the matter to the United States Circuit Court did not deprive this court of full jurisdiction of the cause from the beginning to the end. However, copies of the papers seeking to remand this cause to the Federal Court have been filed in this cause in this court and although the court does not consider them material to the issue the court will allow them to remain on file and deny the motion to strike them therefrom.

Both the motions of the garnishee defendant and the motions of the plaintiff are therefore denied.

(Signed) Ray Hart,

Circuit Judge, 21st Judicial
Circuit of Michigan.

Certificate of the Court

CERTIFICATE OF THE COURT.

(Title of Court and Cause.)

I, Ray Hart, circuit judge of the twenty-first judicial district of Michigan, hereby certify that the foregoing record on appeal constitute the proceedings had in said cause, deemed necessary to a proper understanding of said cause, and that the foregoing assignments of error and reasons and grounds for appeal were attached to said record on appeal at the time of its settlement; and that the time for settling said record has been extended to the date hereof and that after due notice I have settled, signed and certified the same on this 28th day of July, 1939.

(Signed) Ray Hart,
Circuit Judge.

**PROCEEDINGS IN THE SUPREME COURT OF
THE STATE OF MICHIGAN.****CALENDAR ENTRIES.****1939.**

- June 15. Motion to dismiss, filed.
20. Papers in opposition, filed.
21. Motion denied—appeal allowed.
Aug. 2. Record on appeal, filed.
Nov. 20. Note of argument, filed.

1940.

- Jan. 3. Argued and submitted.
Apr. 1. Affirmed with costs.
11. Record returned to court below.
15. Plaintiff's costs taxed at \$83.50.
May 7. Motion for rehearing submitted.
June 18. Motion for rehearing denied with costs to
plaintiff.
24. Petition for stay, filed.
24. Petition for stay granted.
24. Order entered.
July 9. Stay bond approved and filed.

*Notice of Motion in Supreme Court.***NOTICE OF MOTION IN SUPREME COURT.**

STATE OF MICHIGAN—In the Supreme Court for the State of Michigan.

Appeal From the Circuit Court for the County of Isabella.
Hon. Ray Hart, Circuit Judge.

Frank Stevens,
Plaintiff and Appellee,

v.

R. A. Northway, doing business under the assumed name of Northway Clinic and Hospital, R. A. Northway, Roy B. Fisher,
Principal Defendants,
The Metropolitan Casualty Insurance Company of New York, a foreign corporation,
Garnishee Defendant and Appellant.

Calendar No.

Sirs:

You will please take notice that the annexed is a copy of a motion this day entered in the above entitled cause, and that annexed hereto are copies of the affidavits and exhibits this day filed in said cause and upon which said motion is based, and that said motion will be brought on for hearing in said court on Tuesday the 20th day of June, A. D. 1939, at the opening of court on said day, or as soon thereafter as counsel can be heard.

Dated this 13th day of June, A. D. 1939.

Yours, etc.,

B. A. Wendrow,
Worcester & Worcester,
Attorneys for Plaintiff
and Appellee.

To:

Frederick J. Ward, and H. Monroe Stanton, 1117 Dime Bank Building, Saginaw, Michigan, Attorneys for Garnishee Defendant and Appellant.

Crane & Crane, Second National Bank Building, Saginaw, Michigan, Attorneys for Principal Defendants.

MOTION TO DISMISS BY APPELLEE.

(Filed June 15, 1939.)

(Title of Court and Cause.)

Now comes the above named plaintiff and appellee, Frank Stevens, by B. A. Wendrow and Worcester & Worcester, his attorneys, and moves this honorable court for an order dismissing the general appeal taken by the said garnishee defendant, in the above entitled cause, for the following reasons, to-wit:

1. That general appeal is not the proper method of reviewing said cause in this court.

2. That said garnishee defendant and appellant is not seeking to review the judgment entered and does not claim error as to the testimony introduced in support thereof, but sets forth in its grounds and reasons and proposed record for appeal, error only in that the trial court denied its motion to set aside the default taken against it; that such matter being within the discretion of the trial court is reviewable only by way of writ of mandamus.

3. That no transcript of the testimony upon which the judgment against said garnishee defendant was based was served upon attorneys for plaintiff at the time of service upon plaintiff's attorneys of the said garnishee defendant's proposed record on appeal, and no part of such testimony is incorporated in garnishee defendant's proposed record on appeal; that the remedy of said garnishee defendant is by way of application for a writ of mandamus and not by review under general appeal.

4. That the garnishee defendant has not obtained leave to appeal to the Supreme Court from the Circuit Court for the County of Isabella within twenty (20) days from entry of the judgment, on April 17, 1939, entered in the Circuit Court for the County of Isabella, Michigan.

5. That the garnishee defendant has failed to comply with Rule No. 60 of the Michigan Court Rules and has not obtained leave to appeal to the Supreme Court from the Circuit Court for the County of Isabella within twenty

Affidavit in Support of Appellee's Motion to Dismiss

(20) days from entry of the order made April 27, A. D. 1939, denying the garnishee defendant's motion to set aside the default.

6. That the said garnishee defendant and appellant has failed to comply with Michigan Court Rule No. 59 in that its purported claim of appeal is not entitled in the supreme court.

This motion is based upon the records and files in this court in this cause certified by the clerk of the Circuit Court for the County of Isabella, and the affidavit of B. A. Wendrow, one of the attorneys for plaintiff, hereto annexed.

Dated this 13th day of June, A. D. 1939.

B. A. Wendrow,
Worcester & Worcester,
Attorneys for Plaintiff
and Appellee.

Business Address:

Commercial Building,
Mt. Pleasant, Michigan.

AFFIDAVIT IN SUPPORT OF APPELLEE'S MOTION TO DISMISS.

(Title of Court and Cause.)

County of Isabella—ss.

B. A. Wendrow, being first duly sworn, deposes and says that he is one of the attorneys for the plaintiff in the above entitled cause; that on the 15th day of November, A. D. 1938, a judgment was rendered and entered in the Circuit Court for the County of Isabella,

Affidavit in Support of Appellee's Motion to Dismiss

in favor of the plaintiff, against the principal defendants above named, a certified copy of which is hereto attached as Exhibit A; that on the 8th day of March, A. D. 1939, a writ of garnishment was issued out of said Circuit Court directed to The Metropolitan Casualty Insurance Company of New York, a foreign corporation, insurer of said principal defendants, which foreign corporation had been and was authorized to do business in Michigan, in accordance with the statute in such case made and provided; that the said writ of garnishment was, on the 10th day of March, A. D. 1939, duly served upon said garnishee defendant, as will more fully appear by the return of service on file in said Circuit Court in this cause, a certified copy of which writ of garnishment and return of service thereof, are hereto attached as Exhibit B and Exhibit C respectively; that on the 11th day of April, A. D. 1939, the said garnishee defendant, not having appeared in said Circuit Court in said cause and not having filed its disclosure therein in accordance with the statute and rules of court in such case made and provided, its default for failure to appear and to make disclosure was entered in said Circuit Court for the County of Isabella, and a true copy of the affidavits and rule therefore were on the same day served upon the attorneys who claimed to be the attorneys for said garnishee defendant and, which attorneys have now filed a general appeal for and on behalf of said garnishee defendant, a certified copy of said Affidavit of Non-Appearance, Affidavit as Basis for Default, and Order being hereto attached as Exhibit D-1, Exhibit D-2 and Exhibit D-3, respectively, and a true copy of the Proof of Service by plaintiff's attorney, showing service of the aforescribed default papers, is hereto attached as Exhibit E; that on said 11th day of April, 1939, this deponent wrote and mailed a letter, via special delivery, to Mr. H. Monroe Stanton, who at the time of the trial of said principal action, represented and was one of the attorneys for the principal defendant, R. A. Northway, and now who represents the garnishee defendant, to Crane & Crane, who since the trial of said cause have represented and are attorneys for the principal defendants, and to McNamara & Browning, who at

Affidavit in Support of Appellee's Motion to Dismiss

the trial of said principal cause, were attorneys for defendant, R. A. Northway, doing business under the assumed name of Northway Clinic and Hospital, and defendant Roy B. Fisher, a true copy of which letter is hereto attached as Exhibit F; that on the 17th day of April, A. D. 1939, a new and further set of affidavits in support of default and a new and further rule for default was filed in said Circuit Court, true and certified copies thereof being hereto attached as Exhibit G-1, Exhibit G-2 and Exhibit G-3; that thereafter, and on the 17th day of April, A. D. 1939, after waiting approximately one hour after the regular time for opening court and no one appearing for and on behalf of said garnishee defendant, the court proceeded to take the proofs for and on behalf of plaintiff against said garnishee defendant, upon which judgment was entered on said date, a true and certified copy of which judgment is hereto attached as Exhibit H; that thereafter, said garnishee defendant, by its attorneys, Frederick J. Ward and H. Monroe Stanton, filed a Motion to Set Aside the Default entered on the 17th day of April, as above set forth, in said Circuit Court in said cause, which Motion was, on the 27th day of April, A. D. 1939, brought on for hearing before the Honorable Ray Hart, circuit judge, who, after reading the affidavits in support of and in opposition to said Motion and, after listening to arguments of counsel, denied said Motion—a true and certified copy of said Order Denying Motion to Set Aside Default is hereto attached as Exhibit I. on the 1st day of May, A. D. 1939, said garnishee defendant filed its Claim of General Appeal to this honorable court, a true copy of said Claim of Appeal being hereto attached as Exhibit J; that thereafter, and on May 15, 1939, said garnishee defendant filed a Proposed Record on Appeal and attached thereto its Assignments of Error and Reasons and Grounds of Appeal, and Calendar Entries of the matters it desired to have reviewed or appealed, a true and certified copy of said Assignments of Error and Reasons and Grounds of Appeal being hereto attached as Exhibit K and a true copy of the Calendar Entries in said court and cause, certified to date by the Isabella County Clerk, is also hereto attached as Exhibit L; that

Affidavit in Support of Appellee's Motion to Dismiss

no transcript of the testimony was served upon the attorneys for the plaintiff at the time of service upon plaintiff's attorneys of said garnishee defendant's proposed record on appeal; that plaintiff's attorneys were finally compelled to appear in open court, and did appear in open court on Monday, May 15, and formally demand, pursuant to Rule 66 of the Michigan Court Rules, of said garnishee defendant that it furnish plaintiff or his attorneys a copy of the stenographer's minutes or transcript of the testimony taken at the time judgment was rendered against the garnishee defendant, upon which hearing said garnishee defendant, through its attorney, H. Monroe Stanton, finally agreed to furnish plaintiff's attorneys with a copy of such transcript or testimony; and plaintiff is informed and from such information believes that no transcript in support of the judgment against said garnishee defendant was served upon the attorneys for the principal defendants.

Deponent further states that under Rule No. 56, Section 2 (a) of the Supreme Court Rules, jurisdiction to dismiss an appeal for noncompliance with the rules of court is vested in the Supreme Court; that the record provided for by Rules 65 and 66 has not been filed in the Supreme Court and that it is, therefore, necessary to present to this honorable court certified copies of the papers and pleadings upon which this motion is based, copies of said pleadings being hereto attached and certified to by Hugh D. Johnston, Isabella County Clerk, to which certification is affixed the seal of the Circuit Court for the County of Isabella, in order to place in the records of this court the reasons and grounds upon which this motion to dismiss is founded in part.

B. A. Wendrow.

Subscribed and sworn to before me this
13th day of June, A. D. 1939.

Leo J. Mulholland,

Notary Public,

Isabella County, Michigan.

My commission expires January 21, 1941.

EXHIBIT A.**JUDGMENT ENTRY.**

STATE OF MICHIGAN—In the Circuit Court for the
County of Isabella.

Frank Stevens,
Plaintiff,

v.

R. A. Northway, doing business
under the assumed name
of Northway Clinic and
Hospital, R. A. Northway,
Roy B. Fisher,
Defendants.

The jury by whom the issue joined in this cause was tried, having heretofore rendered a verdict in favor of the plaintiff and against all the defendants, and having assessed plaintiff's damages, over and above his costs and charges by him about his suit in this behalf expended, at the sum of ten thousand (\$10,000.00) dollars.

Therefore, it is ordered and adjudged that plaintiff recover against the defendants, his damages as afore-said in the sum of ten thousand (\$10,000.00) dollars, together with his costs and charges to be taxed, and have execution therefor, or that defendant be granted 20 days stay.

Dated November 15, 1938.

(Signed) Ray Hart,
Circuit Judge.

EXHIBIT B.**WRIT OF GARNISHMENT.**

STATE OF MICHIGAN—In the Circuit Court for the
County of Isabella.

Frank Stevens,
Plaintiff,

v.

**R. A. Northway, doing business
under the assumed name
of Northway Clinic and
Hospital, R. A. North-
way, R. B. Fisher,**
Principal Defendants.

**The Metropolitan Casualty
Insurance Company of
New York, a foreign cor-
poration,**
Garnishee Defendant.

In the Name of the People of the State of Michigan:
To the Sheriff of the County of Ingham—Greeting:

Whereas, lately, to-wit, on the 15th day of November, A. D. 1938, a judgment was rendered in the Circuit Court for the County of Isabella in favor of said plaintiff and against said R. A. Northway, doing business under the assumed name of Northway Clinic and Hospital, R. A. Northway, Roy B. Fisher, as defendants, for the sum of ten thousand dollars (\$10,000), and costs, and

Whereas, said plaintiff has filed in the office of the Isabella county clerk the affidavit of B. A. Wendrow, one of the attorneys for plaintiff, stating in said affidavit, among other things, that deponent has good reason to believe, and does believe that The Metropolitan Casualty Insurance Company of New York, a foreign corporation, a nonresident of Isabella County, Michigan,

Exhibit B

and with principal offices in New York City, has property, money, goods, chattels, credits and effects, in its hand and under its custody and control, belonging to the said R. A. Northway, doing business under the assumed name of Northway Clinic and Hospital, R. A. Northway, Roy B. Fisher, whether such indebtedness is now due or not; that said R. A. Northway, doing business under the assumed name of Northway Clinic and Hospital, R. A. Northway, Roy B. Fisher, are justly indebted to the said plaintiff upon such judgment, in the sum of ten thousand dollars (\$10,000), and the additional sum of two hundred twelve dollars and eighty cents (\$212.80), court costs, over and above all legal set-offs; that said sum of ten thousand two hundred twelve dollars and eighty cents (\$10,212.80) is now due and unpaid; that said plaintiff is justly apprehensive of the loss of the same unless a writ of garnishment issue to the aforesaid, The Metropolitan Casualty Insurance Company of New York, a foreign corporation.

Now, therefore, you are hereby commanded to warn and summon the said, The Metropolitan Casualty Insurance Company of New York, a foreign corporation, to appear before said court, at the courthouse in the city of Mt. Pleasant, county of Isabella, on the 31st day of March, A. D. 1939, to make a disclosure in writing, under oath, to be filed with the clerk of said court, touching the liability of said, The Metropolitan Casualty Insurance Company of New York, a foreign corporation, as garnishee of R. A. Northway, doing business under the assumed name of Northway Clinic and Hospital, R. A. Northway, Roy B. Fisher, the said principal defendants in said action as charged in the said affidavit, and that said, The Metropolitan Casualty Insurance Company of New York, a foreign corporation, from the time of due service upon it of this writ shall thenceforth pay no money and deliver no property or effects to the said R. A. Northway, doing business under the assumed name of Northway Clinic and Hospital, R. A. Northway, Roy B. Fisher, the said principal defendants in said action until discharged.

And of this writ you shall make due return.

Exhibit C.

Issued and executed, under the seal of the court at the city of Mt. Pleasant, Michigan, the place of holding said court this 8th day of March, A. D. 1939.

(Signed) Hugh D. Johnston,
County Clerk.

(Seal.)

(Signed) B. A. Wendrow,

(Signed) A. A. Worcester,

Attorneys for Plaintiff.

Business Address:

Suite 12, Commercial Building,
Mt. Pleasant, Michigan.

EXHIBIT C.

The Great Seal of the
State of Michigan
(Seal.)

State of Michigan,
Department of Insurance—ss.

I, H. B. Corell, Deputy Commissioner of Insurance of the State of Michigan, do hereby certify, that the attached writ of garnishment, together with two copies thereof, issued from the Circuit Court of the County of Isabella in the case of Frank Stevens, plaintiff, v. R. A. Northway, doing business under the assumed name of Northway Clinic and Hospital, R. A. Northway, Roy B. Fisher, principal defendants; The Metropolitan Casualty Insurance Company of New York, a foreign corporation, garnishee defendant, was this day served upon

Exhibit C.

me by mail by B. A. Wendrow, attorney, and that one copy to which was securely attached a one dollar bill was forwarded by registered mail to the Metropolitan Casualty Insurance Company of New York, H. J. Jeffery, Resident Attorney, 1756 Penobscot Building, Detroit, Michigan, and that the other copy was filed in this department, all in accordance with the statute in such cases made and provided.

In witness whereof, I have hereunto set my hand, affixed my official seal at Lansing, this 10th day of March, A. D. 1939.

(Signed) H. B. Corell,
Deputy Commissioner of
Insurance.

Commissioner of Insurance
(Seal)
State of Michigan.

EXHIBIT D-1.

AFFIDAVIT OF NONAPPEARANCE.

STATE OF MICHIGAN—In the Circuit Court for the
County of Isabella.

Frank Stevens,
Plaintiff,

v.

R. A. Northway, doing busi-
ness under the assumed
name of Northway Clinic
and Hospital, R. A. North-
way, Roy B. Fisher,
Principal Defendants.

The Metropolitan Casualty
Insurance Company of
New York, a foreign cor-
poration,
Garnishee Defendant.

State of Michigan,
County of Isabella—ss.

B. A. Wendrow, being duly sworn, deposes and says that he is the attorney for Frank Stevens, the above named plaintiff; that a final judgment had heretofore been entered against the above named defendants on, to-wit, the 15th day of November, A. D. 1938, for the sum of ten thousand dollars and costs; that no appeal has been taken by said principal defendants, or either of them, from said judgment within the time allowed by law; that heretofore, to-wit, on the 8th day of March, A. D. 1939, plaintiff filed his affidavit praying for the issuance of a writ of garnishment to the, The Metropolitan Casualty Insurance Company of New York, a foreign corporation, as garnishee defendant of said principal defendants, or some of them; that on said 8th day of March, A. D. 1939, a writ of garnishment was duly issued by the clerk and under the seal of said court, which writ of garnishment was duly served on said garnishee defendant on the 10th day of March, A. D. 1939, as will more fully appear by the return of service on file

Exhibit D-1

in said court; that said writ of garnishment, so served commanded the said garnishee defendant, The Metropolitan Casualty Insurance Company of New York, to appear before said court, at the courthouse in the city of Mt. Pleasant, county of Isabella, on the 31st day of March, A. D. 1939, to make a disclosure in writing, under oath, to be filed with the clerk of said court, touching liability of said, The Metropolitan Casualty Insurance Company of New York, as garnishee of said principal defendants; that up to this time, said garnishee defendant has not appeared and filed its disclosure with the clerk of the court as aforesaid; that the time for so doing has not been extended; that no other steps or proceedings have been taken by this plaintiff to extend the time of filing such disclosure beyond the 31st day of March, A. D. 1939; that said garnishee defendant has not entered or caused to be entered its appearance in said cause according to the rules and practice of said court, except that this deponent finds from an examination of the files and records of said court that on, to-wit, the 28th day of March, A. D. 1939, that said garnishee defendant filed in said court and cause, the following papers, to-wit: a Petition for Removing said Cause to the District Court of the United States for the Eastern District of Michigan, Northern Division, a Bond on Removal, a Notice of Presenting Petition and Bond for Removal, setting said petition for hearing for the 28th day of March, A. D. 1939, at ten a. m., and a proposed order; and this plaintiff admits that late in the afternoon on the 27th day of March, A. D. 1939, he was served with a copy of the aforescribed papers or pleadings; this deponent further states that he has examined the aforesaid papers or pleadings and shows that same are not an appearance on behalf of said garnishee defendant, nor a disclosure in said cause on behalf of said garnishee defendant, in said court and cause. Further this deponent says not.

(Signed) B. A. Wendrow.

Subscribed and sworn to before me this
11th day of April, A. D. 1939.

(Signed) Leo J. Mulholland,

Notary Public,

Isabella County, Michigan.

My commission expires January 21, 1941.

EXHIBIT D-2.**AFFIDAVIT AS BASIS FOR DEFAULT.**

STATE OF MICHIGAN—In the Circuit Court for the
County of Isabella.

Frank Stevens,
Plaintiff,

v.

R. A. Northway, doing business
under the assumed name of
Northway Clinic and Hos-
pital, R. A. Northway, Roy
B. Fisher,
Principal Defendant.

The Metropolitan Casualty In-
surance Company of New
York, a foreign corpora-
tion,
Garnishee Defendant.

State of Michigan,
County of Isabella—ss.

B. A. Wendrow, being duly sworn, deposes and says that he is the attorney for the plaintiff in the above entitled cause; that a final judgment had heretofore been entered against the above named principal defendants, on, to-wit, the 15th day of November, A. D. 1939, for the sum of ten thousand dollars and costs; that no appeal has been taken by said principal defendants, or either of them, from said final judgment, within the time allowed by law; that heretofore, to-wit, on the 8th day of March, A. D. 1939, plaintiff filed his affidavit praying for the issuance of a writ of garnishment to The Metropolitan Casualty Insurance Company of New York, a foreign corporation, as garnishee of said principal defendants, or some of them, that on said 8th day of March, A. D. 1939, a writ of garnishment was duly issued by the clerk and under the seal of said court, which writ

of garnishment was duly served on said garnishee defendant on the 10th day of March, A. D. 1939, as will more fully appear by the return of service on file in said court; that said writ of garnishment, so served commanded the said garnishee defendant, The Metropolitan Casualty Insurance Company of New York, to appear before said court, at the courthouse in the city of Mt. Pleasant, county of Isabella, on the 31st day of March, A. D. 1939, to make a disclosure in writing, under oath, to be filed with the clerk of said court, touching liability of said, The Metropolitan Casualty Insurance Company of New York, as garnishee of said principal defendants; that up to this time, said garnishee defendant has not appeared and filed its disclosure with the clerk of the court as aforesaid; that the time for so doing has not been extended; that no other steps or proceedings have been taken by this plaintiff to extend the time of filing such disclosure beyond the 31st day of March, A. D. 1939; that this deponent has not been served with any notice of appearance or of retainer on the part of said garnishee defendant; that this deponent has this day searched the files and records in said cause in the office of the clerk of this court and does not find that said defendant has filed any notice of its appearance or of retainer, or that it has otherwise appeared or caused its appearance to be entered in said cause and that he does not find that said defendant has filed any motion in said cause denying liability, and that no such motion has been served upon this deponent.

Deponent shows, however, that the files and records of said court show that on, to-wit, the 28th day of March, A. D. 1939, that said garnishee defendant filed in said court and cause, the following papers, to-wit: a Petition for Removing said Cause to the United States District Court for the Eastern District of Michigan, Northern Division, a Bond on Removal, a Notice of Presenting Petition and Bond for Removal, setting said petition for hearing for the 28th day of March, A. D. 1939, at 10 a. m., and a proposed order; and this deponent admits that late in the afternoon on the 27th day of March, A. D. 1939, he was served with a copy of the aforedescribed papers or pleadings; this deponent further shows

Exhibit D-2

that a hearing on said petition was had before said court, sitting in the courthouse in Midland, Michigan, on the 4th day of April, A. D. 1939, at which time the honorable court hearing said matter, rendered its opinion and entered an order, on said 4th day of April, A. D. 1939, denying said garnishee defendant's petition, which order is now on file in said court and cause.

Deponent further states that up to this time no disclosure whatever, of any kind or nature has been filed in said court and cause, on behalf of said garnishee defendant, as appears by deponent's examination made this day of the files in said court and cause, and further that no disclosure has been served upon this deponent in said court and cause; deponent further says that said garnishee defendant has not made and filed in said garnishment action any motion to dismiss or any other special motion and that no motion for security for costs or other special motion of any kind has been served upon this deponent.

Deponent further sayeth not.

(Signed) B. A. Wendrow.

Subscribed and sworn to before me this
11th day of April, A. D. 1939.

(Signed) Leo J. Mulholland,
Notary Public,

Isabella County, Michigan.

My commission expires January 21, 1941.

EXHIBIT D-3.**ORDER.**

STATE OF MICHIGAN—In the Circuit Court for the
County of Isabella.

Frank Stevens,
Plaintiff,

v.

R. A. Northway, doing business
under the assumed name of
Northway Clinic and Hos-
pital, R. A. Northway, Roy
B. Fisher,
Principal Defendants.

The Metropolitan Casualty In-
surance Company of New
York, a foreign corpora-
tion,
Garnishee Defendant.

On reading and filing the return of the Insurance Com-
missioner of the State of Michigan, showing due personal
service upon said defendant; The Metropolitan Casualty
Insurance Company of New York, of a copy of the writ
of garnishment by which the above entitled garnishment
action was commenced, the original of which writ set
the 31st day of March, A. D. 1939, as the disclosure date
in said matter, said disclosure date giving the said gar-
nishee defendant sufficient time as required by law with-
in which to make a disclosure, and said 31st day of
March, A. D. 1939, having elapsed since the service of
said writ of garnishment upon said garnishee defend-
ant, and no appearance having been entered on the part
of said garnishee defendant and no notice of retainer
having been given on the part of said garnishee defend-
ant to said plaintiff or B. A. Wendrow, his attorney, as
shown by affidavit on file, and no disclosure of any kind
having been made up to this time as appears by the affi-

Exhibit D-3

davits of B. A. Wendrow, attorney for plaintiff, on file in this court and cause.

On motion of B. A. Wendrow, attorney for said plaintiff, it is ordered that the appearance of said garnishee defendant, The Metropolitan Casualty Insurance Company of New York, a foreign corporation, and its default for not entering its appearance and not filing its disclosure, be and the same are hereby entered, and that said garnishment cause be referred to the court for assessment of the plaintiff's damages.

Dated this 11th day of April, A. D. 1939.

(Signed) Hugh D. Johnston,
County Clerk.

(Signed) B. A. Wendrow,
Attorney for Plaintiff.

*Exhibit E***EXHIBIT E.****PROOF OF SERVICE BY PLAINTIFF'S ATTORNEY.**

STATE OF MICHIGAN—In the Circuit Court for the
County of Isabella.

Frank Stevens,
Plaintiff,

v.

R. A. Northway, doing business
under the assumed name of
Northway Clinic and Hos-
pital, R. A. Northway,
Roy B. Fisher,
Principal Defendants.

The Metropolitan Casualty In-
surance Company of New
York, a foreign corpora-
tion,
Garnishee Defendant.

State of Michigan,
County of Isabella—ss.

B. A. Wendrow, being first duly sworn, deposes and states that on the 11th day of April, A. D. 1939, he served a true copy of the following papers, to-wit: Affidavit of Non-Appearance, Affidavit as Basis for Default, and Order, all being dated April 11, 1939, and being on file in said court and cause—upon the following named attorneys: H. Monroe Stanton, Bearer Building, Saginaw, Michigan; Crane & Crane, Second National Bank Building, Saginaw, Michigan; McNamara & Browning, Taylor Building, Mt. Pleasant, Michigan, and Frederick J. Ward, 1117 Dime Bank Building, Detroit, Michigan, by placing true copies of the aforescribed papers in envelopes addressed to the aforesaid respective attorneys, to the addresses following their names, which envelopes were so sealed by me and which envelopes contained my return post office address, and upon each of

Exhibit E

which envelopes I placed sufficient legal postage, prepaid, and deposited each of said envelopes in the United States Post Office at Mt. Pleasant, Michigan.

Deponent further states that on April 17, A. D. 1939, he served true copies of the following described papers: Affidavit of Non-Appearance, Affidavit as Basis for Default, and Order, all of which were dated April 17, 1939, and the originals of which were on file in said court and cause, by placing true copies of said papers in envelopes addressed to the following attorneys: H. Monroe Stanton, Bearinger Building, Saginaw, Michigan; Frederick J. Ward, 1117 Dime Bank Building, Detroit, Michigan; McNamara & Browning, Taylor Building, Mt. Pleasant, Michigan, upon each of which envelopes was placed the address of the aforementioned attorneys which follow their respective names herein, which envelopes, so addressed, after having placed true copies of said papers in same, were sealed by me and each of which contained my return post office address, and upon each of which I placed sufficient legal postage, prepaid, and each of which envelopes were deposited by me in the United States Post Office at Mt. Pleasant, Michigan; I further state that I served a true copy of said papers upon Crane & Crane by delivering a true copy thereof personally to William E. Crane, in the city of Mt. Pleasant, Michigan, on the 17th day of April, A. D. 1939.

Deponent further states that on the 11th day of April, A. D. 1939, he notified each of the attorneys to whom the papers above described, dated April 11, 1939, were mailed, that on the 17th day of April, A. D. 1939, at the courthouse in the city of Mt. Pleasant, Michigan, at 10 a. m. of said day, or as soon thereafter as counsel could be heard, that the plaintiff in the above entitled cause would present his proofs and move the court for a judgment against the garnishee defendant, The Metropolitan Casualty Insurance Company of New York—by enclosing a letter in each of the envelopes so addressed to said attorneys setting forth the foregoing notice and facts.

Deponent further states that on the 17th day of April, A. D. 1939, he served a true copy of the judgment entry, dated April 17, 1939, on file in said cause, copy of which

Exhibit E

is annexed hereto, by enclosing a true copy of same in an envelope addressed to the following named attorneys: H. Monroe Stanton, Bearinger Building, Saginaw, Michigan; Frederick J. Ward, 1117 Dime Bank Building, Detroit, Michigan; Crane & Crane, Second National Bank Building, Saginaw, Michigan; McNamara & Browning, Taylor Building, Mt. Pleasant, Michigan, and H. J. Jeffery, 1756 Penobscot Building, Detroit, Michigan—which envelopes also contained addresses of the respective attorneys herein named, as herein set forth, which respective envelopes were duly sealed by me and upon each of which was my return post office address, and upon each of which I placed sufficient legal postage, prepaid, and deposited each of said envelopes in the United States Post Office at Mt. Pleasant, Michigan, and in each of which envelopes I also placed a letter notifying the foregoing attorneys that said judgment entry was a true copy of the judgment this day entered in the above court and cause.

(Signed) B. A. Wendrow.

Subscribed and sworn to before me this
17th day of April, A. D. 1939.

(Signed) Hugh D. Johnston.

My commission expires 1/29/43.

EXHIBIT F.

April 11, 1939.

Mr. H. Monroe Stanton,
Bearinger Building,
Saginaw, Michigan.
Crane & Crane,
Second National Bank Building,
Saginaw, Michigan.
McNamara & Browning,
Taylor Building,
Mt. Pleasant, Michigan.

In re Stevens v. Northway et al.

Gentlemen:

Enclosed herewith are true copies of Affidavit of Non-Appearence, Affidavit as Basis for Default and Order based thereon, filed in the above matter.

You may be advised that on Monday, April 17, at the courthouse in the city of Mt. Pleasant, Michigan, at 10 a. m. of said day, or as soon thereafter as counsel can be heard, the plaintiff in the above entitled cause will present his proofs and move the court for a judgment against the garnishee defendant, The Metropolitan Casualty Insurance Company of New York.

Yours, etc.,

B. A. Wendrow,
Attorney for Frank Stevens.

BAW:HMM.

Enc. 3.

Special Delivery to Stanton.

EXHIBIT G-1.

AFFIDAVIT OF NON-APPEARANCE.

STATE OF MICHIGAN—In the Circuit Court for the
County of Isabella.

Frank Stevens,
Plaintiff,

v.

R. A. Northway, doing business
under the assumed name of
Northway Clinic and Hospital,
R. A. Northway, Roy B. Fisher,
Principal Defendants.

The Metropolitan Casualty In-
surance Company of New
York, a foreign corpora-
tion,
Garnishee Defendant.

State of Michigan,
County of Isabella—ss.

B. A. Wendrow, being duly sworn, deposes and says that he is the attorney for Frank Stevens, the above named plaintiff; that a final judgment had heretofore been entered against the above named defendants on, to-wit, the 15th day of November, A. D. 1938, for the sum of ten thousand dollars and costs; that no appeal has been taken by said principal defendants, or either of them, from said judgment, within the time allowed by law; that heretofore, to-wit, on the 8th day of March, A. D. 1939, plaintiff filed his affidavit praying for the issuance of a writ of garnishment to The Metropolitan Casualty Insurance Company of New York, a foreign corporation, as garnishee defendant of said principal defendants, or some of them; that on said 8th day of March, A. D. 1939, a writ of garnishment was duly issued by the clerk and under the seal of said court, which writ of garnishment was duly served on said garnishee

Exhibit G-1

defendant on the 10th day of March, A. D. 1939, as will more fully appear by the return of service on file in said court; that said writ of garnishment, so served, commanded the said garnishee defendant, The Metropolitan Casualty Insurance Company of New York, to appear before said court, at the courthouse in the city of Mt. Pleasant, county of Isabella, on the 31st day of March, A. D. 1939, to make a disclosure in writing, under oath, to be filed with the clerk of said court, touching liability of said, The Metropolitan Casualty Insurance Company of New York as garnishee of said principal defendants; that up to this time said garnishee defendant has not appeared and filed its disclosure with the clerk of the court as aforesaid; that the time for so doing has not been extended; that no other steps or proceedings have been taken by this plaintiff to extend the time of filing such disclosure beyond the 31st day of March, A. D. 1939; that said garnishee defendant has not entered or caused to be entered its appearance in said cause according to the rules and practice of said court; that said garnishee defendant filed its petition for removal of said cause to the District Court of the United States for the Eastern District of Michigan, Northern Division; that on motion to remand, said cause was remanded to the Circuit Court for the County of Isabella; that the certificate showing that said cause has been so remanded to this court is on file in this court and in this cause. Further deponent says not:

(Signed) B. A. Wendrow.

Subscribed and sworn to before me this
17th day of April, A. D. 1939.

(Signed) Hugh D. Johnston,

Notary Public,

Isabella County, Michigan.

My commission expires 1/29/43.

EXHIBIT G-2.**AFFIDAVIT AS BASIS FOR DEFAULT.**

STATE OF MICHIGAN—In the Circuit Court for the
County of Isabella.

Frank Stevens,
Plaintiff,

v.

R. A. Northway, doing business under the assumed name of Northway Clinic and Hospital, R. A. Northway, Roy B. Fisher,
Principal Defendants,
The Metropolitan Casualty Insurance Company of New York, a foreign corporation,
Garnishee Defendant.

State of Michigan,
County of Isabella—ss.

B. A. Wendrow, being duly sworn, deposes and says that he is the attorney for the plaintiff in the above-entitled cause; that a final judgment had heretofore been entered against the above named principal defendants, on, to-wit, the 15th day of November, A. D., 1938, for the sum of ten thousand dollars and costs; that no appeal has been taken by said principal defendants, or either of them, from said final judgment, within the time allowed by law; that heretofore, to-wit, on the 8th day of March, A. D. 1939, plaintiff filed his affidavit praying for the issuance of a writ of garnishment to The Metropolitan Casualty Insurance Company of New York, a foreign corporation, as garnishee of said principal defendants, or some of them; that on said 8th day of March, A. D. 1939, a writ of garnishment was duly issued by the clerk and under the seal of said court, which writ of garnishment was duly served on said garnishee defendant on the 10th day of March, A. D. 1939, as will more fully appear by the return of service on file in said court;

Exhibit G-2

that said writ of garnishment, so served, commanded the said garnishee defendant, The Metropolitan Casualty Insurance Company of New York, to appear before said court, at the courthouse in the city of Mt. Pleasant, county of Isabella, on the 31st day of March, A. D. 1939, to make a disclosure in writing, under oath, to be filed with the clerk of said court, touching liability, of said, The Metropolitan Casualty Insurance Company of New York, as garnishee of said principal defendants; that up to this time, said garnishee defendant has not appeared and filed its disclosure with the clerk of the court as aforesaid; that the time for so doing has not been extended; that no other steps or proceedings have been taken by this plaintiff to extend the time of filing such disclosure beyond the 31st day of March, A. D. 1939; that this deponent has not been served with any notice of appearance or of retainer on the part of said garnishee defendant; that this deponent has this day searched the files and records in said cause in the office of the clerk of this court and does not find that said garnishee defendant has filed any notice of its appearance or of retainer, or that it has otherwise appeared or caused its appearance to be entered in said cause and that he does not find that said defendant has filed any motion in said cause denying liability, and that no such motion has been served upon this deponent; that said garnishee defendant filed its petition for removal of said cause to the District Court of the United States for the Eastern District of Michigan, Northern Division; that on motion to remand, said cause was remanded to the Circuit Court for the County of Isabella; that the certificate showing that said cause has been so remanded to this court is on file in this court and in this cause.

Deponent further states that up to this time no disclosure whatever, of any kind or nature has been filed in said court and cause on behalf of said garnishee defendant, as appears by deponent's examination made this day of the files in said court and cause, and further that no disclosure has been served upon this deponent in said court and cause; deponent further says that said garnishee defendant has not made and filed in said garnishment action any motion to dismiss or other special motion and that no motion for security for costs or other

Exhibit G-3

special motion of any kind has been served upon this deponent.

Deponent further sayeth not.

(Signed) B. A. Wendrow.

Subscribed and sworn to before me
this 17th day of April, A. D. 1939.

Hugh D. Johnston, (Signed)

Notary Public,

Isabella County, Mich.

My commission expires 1/29/43.

EXHIBIT G-3.**ORDER.**

STATE OF MICHIGAN—In the Circuit Court for the
County of Isabella.

Frank Stevens,
Plaintiff,

v.

R. A. Northway, doing business under the assumed name of Northway Clinic and Hospital, R. A. Northway, Roy B. Fisher,

Principal Defendants,

The Metropolitan Casualty Insurance Company of New York, a foreign corporation,

Garnishee Defendant.

On reading and filing the return of the Insurance Commissioner of the State of Michigan, showing due personal

service upon said defendant, The Metropolitan Casualty Insurance Company of New York, a foreign corporation, of a copy of the writ of garnishment by which the above-entitled garnishment action was commenced, the original of which writ set the 31st day of March, A. D. 1939, as the disclosure date in said matter, said disclosure date giving the said garnishee defendant sufficient time as required by law within which to make a disclosure, and said 31st day of March, A. D. 1939, having elapsed since the service of said writ of garnishment upon said garnishee defendant, and no appearance having been entered on the part of said garnishee defendant and no notice of retainer having been given on the part of said garnishee defendant to said plaintiff or B. A. Wendrow, his attorney, as shown by affidavit on file, and no disclosure of any kind having been made up to this time, as appears by the affidavits of B. A. Wendrow, attorney for plaintiff, on file in this court and cause; and said garnishee defendant having filed its petition for removal of said cause to the District Court of the United States for the Eastern District of Michigan, Northern Division, and a motion to remand having been made and said cause having been remanded to the Circuit Court for Isabella County, as shown by the certificate to remand, remanding said cause, now on file in this court and cause;

On motion of B. A. Wendrow, attorney for said plaintiff, it is ordered that the appearance of said garnishee defendant, The Metropolitan Casualty Insurance Company of New York, a foreign corporation, and its default for not entering its appearance and not filing its disclosure, be and the same are hereby entered, and that said garnishment cause be referred to the court for assessment of plaintiff's damages.

Dated this 17th day of April, A. D. 1939.

(Signed) Hugh D. Johnston,

Isabella County Clerk.

B. A. Wendrow, (Signed)

Attorney for Plaintiff.

EXHIBIT H.
JUDGMENT.

STATE OF MICHIGAN—In the Circuit Court for the
County of Isabella.

Frank Stevens,
Plaintiff,

v.

R. A. Northway, doing busi-
ness under the assumed
name of Northway Clinic
and Hospital, R. A. North-
way, Roy B. Fisher,
Principal Defendants,
The Metropolitan Casualty In-
surance Company of New
York, a foreign corpora-
tion,
Garnishee Defendant.

At a session of said court held at the courthouse in
the city of Mt. Pleasant, Michigan, on this 17th day of
April, A. D. 1939.

Present: The Honorable Ray Hart, circuit judge.

In this cause judgment having heretofore been entered
in favor of the plaintiff and against the principal de-
fendants in the sum of \$10,000.00 and costs having been
taxed in the sum of \$212.80, and

The said, The Metropolitan Casualty Insurance Com-
pany of New York, a foreign corporation, garnishee de-
fendant, having failed to appear and having failed to
file its disclosure herein and within the time provided
by law and the rules of the court and the default of
The Metropolitan Casualty Insurance Company of New
York, a foreign corporation, garnishee defendant, for
failure to file its disclosure and to appear or to plead
having been duly entered and the court having heard
testimony and arguments of counsel on behalf of the
plaintiff and the damages of the plaintiff having been

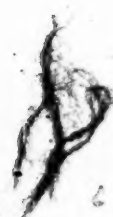
Exhibit H

regularly assessed by the court at the sum of \$10,418.30, which sum includes the sum of \$205.50, interest on said judgment heretofore entered, and the court being fully advised in the premises.

Thereupon on motion of B. A. Wendrow, one of the attorneys for the plaintiff, it is ordered and adjudged that plaintiff recover against said, The Metropolitan Casualty Insurance Company of New York, a foreign corporation, garnishee defendant, the sum of ten thousand four hundred eighteen dollars and thirty cents (\$10,418.30) and costs to be taxed and have execution therefor.

(Signed) Ray Hart,
Circuit Judge.

Countersigned:
Hugh D. Johnson, (Signed)
Clerk.



*Exhibit I***EXHIBIT I.****ORDER DENYING MOTION TO SET ASIDE
DEFAULT.**

STATE OF MICHIGAN—In the Circuit Court for the
County of Isabella.

Frank Stevens,
Plaintiff,

v.

R. A. Northway, doing busi-
ness under the assumed
name of Northway Clinic
and Hospital, R. A. North-
way, Roy B. Fisher,
Principal Defendants,
The Metropolitan Casualty In-
surance Company of New
York, a foreign corpora-
tion,
Garnishee Defendant.

At a session of said court held at the courthouse in
the city of Midland, Michigan, on this 27th day of April,
A. D. 1939.

Present: The Honorable Ray Hart, circuit judge.

In this cause The Metropolitan Casualty Insurance
Company of New York, a corporation, garnishee defend-
ant, by Frederick J. Ward and H. Monroe Stanton, its
attorneys, having on the 18th day of April, A. D. 1939,
filed a motion to set aside the default entered by plain-
tiff on the 17th day of April, A. D. 1939, and the said
plaintiff, Frank Stevens, having filed his answer in oppo-
sition thereto, and the said garnishee defendant being
present in court by H. Monroe Stanton, one of its at-
torneys, and the plaintiff being present in court by B. A.
Wendrow, one of his attorneys, and the principal de-
fendants being present in court by Crane & Crane and
Henry E. Naegely, Jr., their attorneys, and the court
having heard the arguments of counsel on behalf of said

Exhibit I

parties, and it appearing that the attorneys now representing the garnishee defendant formerly represented the principal defendants during the trial of the principal suit, and the court having heretofore entered judgment on proper hearing against the garnishee defendant, and it further appearing that the default of the garnishee defendant had been heretofore properly and regularly entered against the garnishee defendant and judgment properly entered on default against said garnishee defendant, and it further appearing that the garnishee defendant has failed to properly protect its rights in this court by appearing or filing a disclosure within the time allotted by law and the rules of the court, and it further appearing that said garnishee defendant has shown no valid reason to support its motion, and it further appearing that said garnishee defendant has failed to show a meritorious defense so that justice would require a revision of said decision and judgment heretofore rendered, and the court being fully advised in the premises,

It is hereby ordered that the motion to set aside the default of April 17, A. D. 1939, made and filed by the garnishee defendant herein, be and the same hereby is denied with costs to the plaintiff;

It is further ordered, that the garnishee defendant having on the trial hereof filed an amended motion and affidavit by H. Monroe Stanton in support thereof and the plaintiff having on this hearing denied the allegations contained in said amendments and having denied the statements made in the affidavit of H. Monroe Stanton in open court, that plaintiff, by his attorneys, be given leave to file formal answer to said amendments and said affidavit of H. Monroe Stanton.

(Signed) Ray Hart,
Circuit Judge.

Countersigned:
Hugh D. Johnston, (Signed)
Clerk.

EXHIBIT J.

CLAIM OF APPEAL.

STATE OF MICHIGAN—In the Circuit Court for the
County of Isabella.

Frank Stevens,
Plaintiff,

v.

R. A. Northway, doing business under the assumed name of Northway Clinic and Hospital, R. A. Northway, Roy B. Fisher,

Principal Defendants,

The Metropolitan Casualty Insurance Company of New York, a foreign corporation,

Garnishee Defendant.

The Metropolitan Casualty Insurance Company of New York, a foreign corporation, garnishee defendant, claims an appeal from the default judgment entered April 17th, 1939, by the Circuit Court for the County of Isabella, State of Michigan, and from said court's order and opinion of April 27, 1939, denying said garnishee defendant's motion to set aside said default judgment, filed April 18, 1939. Appellant takes a general appeal.

Dated: May 1st, A. D. 1939.

(Signed) Frederick J. Ward,

(Signed) H. Monroe Stanton,

Attorneys for Appellant.

Business Address:

1117 Dime Building,
Detroit, Michigan.

EXHIBIT K.**ASSIGNMENTS OF ERROR AND REASONS AND
GROUNDS OF APPEAL.**

STATE OF MICHIGAN—In the Circuit Court for the
County of Isabella.

Frank Stevens,
Plaintiff,

v.

R. A. Northway, doing busi-
ness under the assumed
name of Northway Clinic
and Hospital, R. A. North-
way, Roy B. Fisher,
Principal Defendants,

The Metropolitan Casualty In-
surance Company of New
York, a foreign corpora-
tion,

Garnishee Defendant.

Now comes the garnishee defendant and appellant, and by Frederick J. Ward and H. Monroe Stanton, its attorneys, say that in the records and proceedings in said cause, in the Circuit Court in the County of Isabella, there is a manifest error as follows:

(1) That the court erred in granting a default judgment against the garnishee defendant, because the plaintiff and his counsel had notice and knowledge that the garnishee defendant was not indebted to the principal defendant, and a disclosure advising the plaintiff and his counsel of the garnishee defendant's position had been served upon plaintiff's counsel.

(2) That the default of the garnishee defendant, as taken, was not regular and according to the rules of practice of the court.

(3) That the garnishment summons as issued and served, was not in accordance with the statutes of the state, and the rules of the court, in that it did not give

Exhibit K

the garnishee defendant the required time within which to file its disclosure.

(4) That the default judgment against the garnishee defendant was taken irregularly and by sharp practice on the part of plaintiff's counsel.

(5) That the garnishee defendant has a good and meritorious defense to the plaintiff's claim, of which plaintiff's counsel had knowledge and notice, and the garnishee defendant has been deprived of its day in court.

(6) That the trial court erred and abused its discretion in denying the motion of the garnishee defendant to set aside the default.

And for the errors aforesaid, the garnishee defendant and appellant prays that the judgment entered in said cause ought to be reversed, vacated and set aside, and the said cause remanded to the state court for trial upon the merits.

(Signed) Frederick J. Ward,

(Signed) H. Monroe Stanton,

Attorneys for Garnishee

Defendant and Appellant.

Business Address:

1117 Dime Building,

Detroit, Michigan.

May 13, 1939.

*Exhibit L***EXHIBIT L.****CALENDAR ENTRIES.**

Circuit Court,
County of Isabella, Michigan.

Frank Stevens

v.

R. A. Northway, doing business under the assumed name of Northway Clinic and Hospital, et al:

Case Number 3048.

1938.

- Jan. 24. Summons with copy of declaration issued.
- 24. Rules to plead and declaration, filed.
- Feb. 8. Notice of appearance of Frederick J. Ward, filed.
- 8. Notice of appearance of McNamara & Browning, filed.
- 24. Answer, filed.
- 24. Appearance, filed.
- 24. Answer, filed.
- Mar. 7. Answer of defendant, Roy B. Fisher, filed.
- Sept. 24. Notice of appearance, filed.
- 26. Consent to substitution, filed.
- 27. Notice to produce on trial and subpoena, filed.
- Oct. 6. Verdict rendered in favor of plaintiff and against all defendants in the sum of \$10,000.
- 18. Notice of motion, and motion to enter verdict of no cause for action, filed.
- Nov. 9. Notice of motion and motion to enter verdict of no cause for action, filed.
- 15. Answer to motion of R. A. Northway, filed.
- 15. Answer to motion of R. A. Northway, doing business under assumed name of Northway Clinic and Hospital, and Roy B. Fisher, filed.
- 15. Judgment entry filed and entered in C. C. O., page 142.

Exhibit L

15. Order filed and entered in C. C. O., page 143.
15. Order filed and entered in C. C. O., page 142.
26. Notice of motion and motion for new trial, filed.
28. Notice of motion for new trial, motion for new trial, filed.
30. Notice and motion for new trial, filed.
30. Notice and motion for new trial, filed.
- Dec. 3. Stipulation for adjournment of hearing on motion for new trial, filed.
12. Stipulation for adjournment of hearing on motion for new trial, filed.
19. Answer to defendant, motion for new trial, filed.
19. Notice of retainer, filed.
21. Order denying motion for new trial, filed and entered in C. C. O., page 145.
21. Order denying motion for new trial, filed and entered in C. C. O., page 144.
21. Order denying motion for new trial, filed and entered in C. C. O., page 145.
- 1939.
- Jan. 5. Order for transcript, filed.
- Feb. 2. Taxed bill of costs of \$212.80, filed.
- Mar. 8. Writ of garnishment issued.
8. Affidavit for writ of garnishment, filed.
16. Writ of garnishment returned and filed.
27. Notice of presenting petition and bond for removal, filed.
28. Petition for removal, filed at 10 o'clock A. M.
28. Bond for removal, filed at 10 o'clock A. M.
- Apr. 5. Answer to garnishee defendant's petition for removal of cause, filed.
7. Answer to petition for removal of cause, filed.
10. Proof of service, filed.
11. Affidavit of nonappearance; affidavit as basis for default and order, filed.
11. Order denying motion to transfer cause, filed and entered in C. C. O., page 147.
15. Notice of removal, filed.
17. Order to remand to state court duly certified and filed.

Exhibit L

17. Affidavit of nonappearance; affidavit as basis for default and order, filed.
 17. Judgment entered \$10,000.00; interest \$205.00; costs of \$212.80.
 17. Judgment, filed, C. C. O., page 149.
 17. Proof of service by county clerk, filed.
 17. Proof of service by plaintiff's attorney, filed.
 18. Notice of motion, motion to set aside default and affidavit in support thereof, filed.
 24. Proof of service of special appearance and motion to set aside default, filed.
 26. Answer to motion to set aside default, filed.
 27. Amendment to motion to set aside default and affidavit in support thereof, filed.
- May
1. Claim of appeal, filed.
 1. Opinion and order denying motion to set aside default judgment, filed.
 1. Appeal bond, filed.
 3. Order denying motion to set aside default, filed, C. C. O., page 153.
 5. Answer to amendment to motion to set aside default, filed.
 5. Affidavit of proof of service, filed.
 6. Notice of filing of appeal bond, filed.
 8. Order staying proceedings, filed.
 8. Motion to stay proceedings and affidavit thereon, filed.
 8. Order staying proceedings entered in C. C. O., page 154.
 15. Garnishee defendant and appellant's proposed record on appeal, reasons and grounds for appeal and notice of settlement, filed.
 15. Notice of filing of appeal bond, filed.
 15. Notice and appeal bond, filed.
 15. Order approving appeal bond, filed and entered in C. C. O., page 155.
 15. Motion to strike and notice of motion, filed.
 20. Notice of motion, motion to strike and affidavit, filed.
 27. Answer to motion to strike and affidavit, filed.

Certificate of Clerk of Copies of Record

CERTIFICATE OF CLERK OF COPIES OF RECORD.

(Title of Court and Cause.)

State of Michigan,
County of Isabella—ss.

I, Hugh D. Johnston, clerk of said county of Isabella, and clerk of the Circuit Court for said county, do hereby certify that I have compared the foregoing copies of the pleadings described as follows:

	Exhibit.
Judgment entry	A
Writ of garnishment	B
Return of service	C
Affidavit of nonappearance	D-1
Affidavit as basis for default	D-2
Order	D-3
Proof of service by plaintiff's attorney ...	E
Affidavit of nonappearance	G-1
Affidavit as basis for default	G-2
Order	G-3
Judgment	H
Order denying motion to set aside default..	I
Claim of appeal	J
Assignments of error and reasons and grounds of appeal	K
Calendar entries	L

which foregoing copies of pleadings are entitled as exhibits as shown above, with the original records thereof, now remaining in my office, and that the foregoing copies, enumerated above, are true and correct transcripts therefrom and of the whole of such original records, respectively.

I further hereby certify that the calendar entries of February 8, 1938, entitled, "Notice of Appearance of Frederick J. Ward," is the appearance of Frederick J. Ward for R. A. Northway; that the calendar entry of February 8, 1938, entitled "Notice of Appearance of McNamara & Browning," is the appearance of McNamara & Browning for Roy B. Fisher; that the calendar entry

Proof of Service

of February 24, 1938, entitled "Appearance filed," is the appearance of McNamara & Browning for R. A. Northway, doing business under the assumed name of Northway Clinic and Hospital; that the calendar entry of September 24, 1938, entitled "Notice of Appearance filed," is the appearance of H. Monroe Stanton, as attorney of counsel for R. A. Northway.

In testimony whereof I have hereunto set my hand and affixed the seal of said court and county this 7th day of June, A. D. 1939.

Hugh D. Johnston.

(Seal.)

PROOF OF SERVICE.

(Title of Court and Cause.)

County of Isabella—ss.

B. A. Wendrow, being first duly sworn, deposes and says that he served a true copy of all of the foregoing and attached papers in the above-entitled cause, to-wit, notice of motion in supreme court, motion to dismiss, affidavit in support thereof, exhibits in support thereof, marked A to L, inclusive, and plaintiff's law brief, upon Frederick J. Ward and H. Monroe Stanton, who, at the present time, are attorneys for the said garnishee defendant, The Metropolitan Casualty Insurance Company of New York, a foreign corporation, and upon Crane & Crane, attorneys for said principal defendants, by placing true copies of all of the aforescribed papers, same being copies of all of the papers attached to this proof

*Garnishee Defendant and Appellant's Answer to Plaintiff
and Appellee's Motion to Dismiss*

of service and also plaintiff's law brief, in envelopes, one of which envelopes was addressed to "Frederick J. Ward and H. Monroe Stanton, 1117 Dime Bank Building, Detroit, Michigan," and the other of which envelopes was addressed to "Crane & Crane, Second National Bank Building, Saginaw, Michigan," after a complete set of said foregoing papers was placed in each of said envelopes, was duly sealed by me, and upon each of which envelopes was my return address, and sufficient legal postage, prepaid, by placing and depositing each of said envelopes so sealed, on the 13th day of June, A. D. 1939, in the United States Post Office at Mt. Pleasant, Michigan, and by registering said envelopes so addressed to Frederick J. Ward and H. Monroe Stanton, and requesting return receipt therefor.

B. A. Wendrow.

Subscribed and sworn to before me
this 13th day of June, A. D. 1939.

Leo J. Mulholland,

Notary Public,

Isabella, County, Mich.

My commission expires January 21, 1941.

**GARNISHEE DEFENDANT AND APPELLANT'S
ANSWER TO PLAINTIFF AND APPELLEE'S
MOTION TO DISMISS.**

(Title of Court and Cause.)

Now comes the Metropolitan Casualty Insurance Company of New York, a foreign corporation, garnishee defendant and appellant in the above captioned matter, and

*Garnishee Defendant and Appellant's Answer to Plaintiff
and Appellee's Motion to Dismiss*

for answer to plaintiff and appellee's motion to dismiss its appeal, shows as follows:

(1) In answer to the first paragraph of plaintiff's motion, garnishee defendant and appellant denies the same, and alleges that its appeal is from a final judgment entered against it in the Circuit Court for the County of Isabella, and is appealable by a general appeal.

(2) In answer to the second paragraph and reason, garnishee defendant and appellant denies the same, and alleges that it is seeking to review the judgment entered, but admits that it does not claim error as to the testimony introduced in support thereof, but alleges that said judgment was erroneously entered on the face of the record and by sharp practice by plaintiff's attorneys, and that as part of its general appeal, it seeks also to review the order of the trial court, in denying its motion to set aside said default and judgment.

(3) In answer to the third paragraph and reason for plaintiff's motion, defendant admits the same, but alleges and will rely upon the fact that no error, or reason or ground for appeal is directed against the testimony taken at the time said default judgment was entered, and that a transcript of the testimony taken is not a necessary part of its proposed record on appeal, but that upon demand of the attorneys for the plaintiff and appellee, a transcript of said testimony was furnished to him, to assist him in preparing a proposed amendment to appellant's record on appeal.

(4) In answer to the fourth paragraph of plaintiff's motion, garnishee defendant and appellant admits the same, and in further answer thereto, alleges that the judgment being a final judgment and in excess of \$500.00 (five hundred dollars), garnishee defendant and appellant, procedure by general appeal is proper.

(5) In answer to the fifth paragraph of plaintiff and appellee's motion to dismiss, garnishee defendant and appellant admits the same, but submits that in its appeal from the final judgment by general appeal, it has the right also to review the order of the trial judge in denying its motion to set aside the default and judgment.

(6) In answer to the sixth paragraph and reason of

Affidavit

plaintiff and appellee's motion to dismiss, defendant admits that its claim of appeal is erroneously entitled in the state court, but that the same is a matter of form, but alleges that plaintiff and appellee's motion to dismiss on sixth ground was not made timely and within fifteen days after service of a copy of the same upon him, in compliance with Section Two of Rule 58 of the Michigan Court Rules.

This answer is based upon the records and files attached to plaintiff and appellee's motion to dismiss and the affidavit and exhibits of Frederick J. Ward, attorney for garnishee defendant and appellant, hereto attached.

Frederick J. Ward,
H. Monroe Stanton,
Attorneys for Garnishee
Defendant and Appellant.
Business Address:
1117 Dime Building,
Detroit, Michigan.

June 19th, 1939.

AFFIDAVIT.

(Title of Court and Cause.)

State of Michigan,
County of Wayne—ss.

Frederick J. Ward, being first duly sworn, deposes and says that he is an attorney at law and one of the attorneys of record for the Metropolitan Casualty Insurance

Affidavit

Company of New York, a foreign corporation, garnishee defendant and appellant in the above captioned matter.

That subsequent to the judgment entered in favor of the plaintiff and appellee, against the principal defendants in the above captioned cause, a garnishment summons was issued against the garnishee defendant and appellant from the Circuit Court for the County of Isabella, on the 8th day of March, 1939; said writ of garnishment being returnable in said court on the 31st day of March, 1939, twenty-three days after the same was issued.

That said writ of garnishment was served upon the garnishee defendant by substituted service upon the Commissioner of Insurance for the State of Michigan, on the 10th day of March, 1939.

That said writ of garnishment was returnable within thirty days, contrary to Section 3 of Rule 27 of the Michigan Court Rules.

That said garnishee defendant being a foreign corporation, and feeling that the issue between it and the plaintiff was a separate issue from the plaintiff and principal defendant, said garnishee defendant and appellant caused said issue to be moved into the United States District Court for the Eastern District of Michigan and filed its disclosure therein, and served a copy of said disclosure upon said attorney for plaintiff and appellee, copy of which disclosure is attached hereto and marked Exhibit A.

That on the 11th day of April, 1939, while said removal proceedings were pending in the United States District Court for the Eastern District of Michigan, plaintiff and appellee, through his attorney, filed an affidavit of nonappearance and an affidavit as basis for default against said garnishee defendant in the Circuit Court for the County of Isabella, State of Michigan, although he had notice and knowledge that said matter was removed to the United States District Court for the Eastern District of Michigan.

That on Saturday, the 15th day of April, 1939, on motion of principal defendant, and the appearance and argument of attorney for the plaintiff and appellee, an order was entered in the United States District Court

Affidavit

for the Eastern District of Michigan, Northern Division, remanding said cause to the Circuit Court for the County of Isabella, State of Michigan; United States District Court Judge feeling that the proceedings were ancillary to the principal cause in the state court, and that its removal might complicate the issues.

That following the hearing on said motion in the United States District Court for the Eastern District of Michigan, Northern Division, on Saturday, the 15th day of April, 1939, H. Monroe Stanton, one of garnishee defendant and appellant's attorneys, had a conversation with B. A. Wendrow, attorney for plaintiff and appellee, wherein there was a discussion and agreement that plaintiff and appellee would set aside the default entered in the state court on the 11th day of April, 1939, as appeared by the affidavit of said H. Monroe Stanton, original of which is on file in the Circuit Court for the County of Isabella, State of Michigan, and copy of which is attached hereto and marked Exhibit B.

That on Monday morning, April 17th, 1939, deponent received a special delivery letter from H. Monroe Stanton, his co-counsel, original of which is attached hereto and marked Exhibit C, in which the said H. Monroe Stanton referred to his talk and agreement with attorney B. A. Wendrow, regarding said default, and that immediately upon receipt of said special delivery letter, Exhibit C, deponent called the said counsel, H. Monroe Stanton, at Saginaw, Michigan, and advised him to enter into the stipulation with the attorney for the appellee as suggested in said letter.

That in spite of the disclosure served on the attorney for plaintiff and appellee, which advised him in detail of the garnishee defendant and appellant's position, and in spite of the agreement as appears by Exhibit B, a default judgment was entered against said garnishee defendant and appellant in the Circuit Court for the County of Isabella on the following Monday morning, April 17th, 1939.

That the default papers entered against said garnishee defendant and appellant in the Circuit Court for the County of Isabella, on the 11th day of April, 1939, were improvidently entered, as said cause was then pending

Affidavit

in the United States District Court for the Eastern District of Michigan.

That the second set of default papers filed in said matter, were filed on the same morning that the default judgment was entered and service of the same upon the garnishee defendant's attorneys was not made until after the judgment was entered.

That the said garnishee defendant and appellant immediately moved to set aside default and secure a trial of said garnishment issues upon the merits.

That the entry of the judgment against it on the 17th day of April, 1939, was unwarranted under the circumstances and sharp practice upon the part of plaintiff's counsel.

That the judgment entered against garnishee defendant on the 17th day of April, 1939, was premature and untimely entered on the face of the record for the reason that the garnishee defendant and appellant's special motion, filed in the Circuit Court for the County of Isabella to remove said cause to the United States District Court for the Eastern District of Michigan was denied by the Circuit Court Judge on the 11th day of April, 1939, and the garnishee defendant would therefore have an additional fifteen days within which to file its disclosure in the state court, under Section 3 of Rule 27 of the Michigan Court Rules.

That the said garnishee defendant and appellant has a good and meritorious defense to plaintiff's claim, as appears by its disclosure, copy of which was served on the attorneys for the appellee, and should have a hearing of its defense upon the merits.

Further deponent sayeth not.

Frederick J. Ward.

Subscribed and sworn to before me
this 19th day of June, A. D. 1939,

Mabelle I. Vallire,

Notary Public,

Wayne County, Mich.

My commission expires 5-21-43.

EXHIBIT A.

UNITED STATES OF AMERICA—In the District Court
of the United States For the Eastern District of
Michigan, Northern Division.

Frank Stevens,
Plaintiff,

v.

R. A. Northway, doing business
under the assumed name of
Northway Clinic and Hos-
pital, R. A. Northway, Roy
B. Fisher,

Principal Defendants.

The Metropolitan Casualty In-
surance Company of New
York, a foreign corporation,
Garnishee Defendant.

DISCLOSURE FOR THE METROPOLITAN CAS-
UALTY INSURANCE COMPANY OF NEW
YORK, A FOREIGN CORPORATION.

State of Michigan,
County of Wayne—ss.

Frederick J. Ward, being duly sworn, deposes and says
that the Garnishee Defendant, above named, is a foreign
corporation, authorized to do business in the State of
Michigan, and that the principal business office of said
Company is in the State of New Jersey.

Deponent further says that he is the attorney for said
Garnishee Defendant in this cause, and is familiar with
the facts in relation thereto, and at the time of the serv-
ice of the Garnishee Summons thereon, to-wit, on March
10th, 1939, by serving on the Insurance Commissioner
of the State of Michigan, as representative of said
Garnishee Defendant, was not indebted to said principal
defendants, or any of them, in any sum of money what-
soever, and that it had no other money, property, or

Exhibit A

effects in its hands, or under its control, belonging to said principal defendants, or any one of them.

That as a special defense to any claim said plaintiff or principal defendants should make against said garnishee defendant, it shows to the court that on or about the 1st of February, 1936, the said defendant issued to said R. A. Northway, a policy known as a professional liability policy, and from time to time thereafter, issued renewal certificates on said policy, which certificates were subject to all the terms and conditions of said policy.

That said policy together with any and all renewal certificates, by a special endorsement attached thereto, did not cover any claims made by reason of the operation of said R. A. Northway, principal defendant, or the ownership in whole or in part, by said R. A. Northway, of any sanitarium, hospital, clinic or other business enterprise, and the basis of the claim upon which the judgment was rendered against the said principal defendants, was the result of the operation, ownership and use of the Northway Clinic and Hospital.

For the further reason that by the coverage under said policy, together with all renewals and certificates thereon, was confined exclusively to said R. A. Northway, and work done by him, and not as the result of any loss or claim from the operation of said hospital or clinic, or as the result of delegating his agency to any other person.

That said policy contained a clause that in the event of any injury for which it was claimed said R. A. Northway was liable, he would give immediate notice thereof to the garnishee defendant herein.

That the said R. A. Northway failed to comply with said terms and provisions of said insurance policy with respect to giving notice and failed to give immediate notice to this company of the alleged injury to said Frank Stevens, as soon as said injury of burning was brought to his attention and definitely known by him to be an injury or burn received in his hospital, for which said plaintiff was claiming said R. A. Northway was liable.

For his failure to give such notice was in violation of the terms and provisions of said policy, and therefore, this defendant would not be liable.

Exhibit A

For the further reason that the cause of the injury or burn, upon which said Frank Stevens, the plaintiff herein, made claim against said garnishee defendant, was the result of the use of an X-ray machine, located and operated at the Northway Clinic and Hospital, and used in a diagnosis by Dr. Roy B. Fisher, who was an employee in the service of said R. A. Northway, at the Northway Hospital and Clinic, and any liability against said defendant, under and by virtue of the terms and provisions of their policy, would be excluded by the endorsement attached thereto, and hereinbefore referred to.

That the alleged burn, caused by the X-ray, as herein set forth, is claimed by said Frank Stevens, to have taken place in the latter part of January, 1937, and that the said R. A. Northway, one of the principal defendants herein, and who was covered exclusively by said insurance policy, had knowledge of said burn and claim by said Frank Stevens, immediately and he treated him at his hospital for approximately two weeks in February, 1937, and continued treatment of him during the entire summer of 1937; sent him to hospitals for treatment and assumed the liability thereon; paid for certain medical aid and attention that was received by said Stevens during the summer of 1937, the said R. A. Northway failed and refused to comply with the terms and provisions of said insurance policy, and give immediate notice of said burning and claim under said policy, to said defendant herein, until August 7th, 1937, which was in violation of the terms and provisions of said policy, and would therefore relieve said defendant of any and all liability thereon, or to said R. A. Northway, in any manner whatsoever.

That while the said R. A. Northway, one of the principal defendants herein, had notice of the injury and burn existing on Frank Stevens, and during which time he failed to notify said garnishee defendant hereof, he, his assistant and the Northway Hospital and Clinic admitted liability by reason of medical treatment rendered to said Stevens, by reason of the fact that he sent him to other hospitals, clinics and doctors for attention; paid for such medical attention and consented that such medical atten-

Exhibit A

tion be paid for by the hospital and clinic, all of which was known to said R. A. Northway.

That other medical bills, hospital bills were paid by said Northway, his assistant, or the Northway Clinic and Hospital with his knowledge and permission and he continued to handle said claim through himself and his attorneys for several months, without giving any notice to said insurance company of such injury and claim, all of which prejudiced their rights and interests under said policy, and would relieve them of any and all liability and indebtedness to said R. A. Northway.

That under the terms and provisions of said policy, issued exclusively to said R. A. Northway, all matters which we have here set forth; all of the dealings and relations, admissions of liability, negotiations with attorneys and other transactions which took place from the date of the original claim and X-ray burn, to-wit, January, 1937 to August 7th, 1937, the date he notified said insurance company of such injury, burn and claim, the interests of the Metropolitan Casualty Insurance Company of New York, garnishee defendant herein, were greatly and badly prejudiced, and as a result thereof, there would be no liability on the part of said insurance company, under and by virtue of the terms and provisions of said professional liability policy herein referred.

That immediately upon receiving notice of said injury and claim in August, 1937, the said defendant denied all liability, on said policy, to said principal defendant, R. A. Northway, for the reasons herein set forth, and at the request of said Northway and his attorneys, consented to aid said Northway in defense of the Stevens case, and thereafter and on the 7th day of January, 1936, entered into a Non-Waiver Agreement with said Northway and said garnishee defendant, wherein said Northway admitted that the policy issued by said garnishee defendant to said Northway, did not cover any claims made by reason of his operation or ownership of a sanitarium, hospital, clinic or other business enterprise, and that said Northway had knowledge of the covenants, and agreements in said policy with respect to reporting any claims or injuries for which there would be any liability there-

Exhibit A

under, and that said policy was confined to coverage exclusively to R. A. Northway.

That the said Frank Stevens, in January, 1937, claimed to have received an X-ray burn while receiving treatment at the Northway Clinic and Hospital, and that he, said Northway, had notice of said claim for X-ray burn of said Stevens for a long period of time; that he rendered his medical treatment, and that a part of the medical bills therefor, were paid by Dr. Roy B. Fisher, one of the defendants herein, and an employee in the Northway Clinic and Hospital.

That he, the said Northway, had been in consultations with his attorney with respect to the claim, had continued to handle the claim, medical treatment and negotiations, up to the date of said agreement, although he, the said R. A. Northway, did not give notice of said claim, burn or injury, or any claim that Stevens was making to the garnishee defendant herein, until August 7th, 1937, and that as the result of such admissions on behalf of said R. A. Northway, which were in violation of the terms and provisions of said professional liability insurance policy, there would be no liability to said garnishee defendant, under and by virtue of said insurance policy, and said garnishee defendant would not have under its control, or in its possession, any money, property, or effects of any kind belonging to said R. A. Northway, or any of the defendants.

That thereafter, under date of January 10th, 1939, and in accordance with the terms and provisions of said Non-Waiver Agreement, said garnishee defendant, the Metropolitan Casualty Insurance Company of New York, gave notice to said R. A. Northway, that for the reason hereinbefore set forth in this Disclosure, and in accordance with the Non-Waiver Agreement entered into between the parties, and the former notice given to said R. A. Northway, at the time of the original report of this accident, that there was no liability on the part of said garnishee defendant under and by virtue of the terms and provisions of said professional liability policy herein referred to.

And that by reason of all the foregoing facts, the said garnishee defendant is not indebted to, nor has it

Exhibit B

under its control, any property, moneys, or effects belonging to any of said principal defendants.

Frederick J. Ward.

Subscribed and sworn to before me
this 7th day of April, 1939, A. D.

Mabel I. Vallire,

Notary Public,

Wayne County, Mich.

My commission expires 6-13-39.

EXHIBIT B.**AFFIDAVIT.**

STATE OF MICHIGAN—In the Circuit Court for the
County of Isabella.

Frank Stevens,
Plaintiff,

v.

R. A. Northway, doing business
under the assumed name of
Northway Clinic and Hos-
pital, R. A. Northway, Roy
B. Fisher,

Principal Defendant,

The Metropolitan Casualty In-
surance Company of New
York, a foreign corporation,
Garnishee Defendant.

State of Michigan,
County of Saginaw—ss.

H. Monroe Stanton, being duly sworn, deposes and

Exhibit B

says that on April 15, A. D. 1939, the above entitled cause had been transferred to the District Court of the United States, for the Eastern District of Michigan, Northern Division, and that on said day, a motion to remand said cause was heard before the court, and that the plaintiff herein did not file an appearance in said Federal Court action, but that after said motion to remand, filed by the principal defendant herein, was heard and granted the said B. A. Wendrow, attorney for the plaintiff herein, did agree with your deponent to set aside the default papers entered in this cause and was told by your deponent that before agreeing to such procedure, he would have to get in touch with Mr. Frederick Ward, who is associated with your deponent in this cause of action, and obtain his opinion, and that your deponent did telephone the said B. A. Wendrow, the following day, and the said B. A. Wendrow did then inform your deponent that he would not go through with said agreement.

Deponent further states that the writ of garnishment issued in this case provided that disclosure should be made on March 31, 1939, and that said writ of garnishment was served upon the Insurance Commissioner for the State of Michigan, on March 10, 1939, and that said writ of garnishment provided for only twenty-one (21) days from the date of service, in which to allow said garnishee defendant to make a disclosure, rather than thirty (30) days, as required by Rule No. 27 of the Michigan Court Rules.

Further deponent sayeth not.

(Signed) H. Monroe Stanton.

Subscribed and sworn to before me
this 26th day of April, A. D. 1939.

Ruth K. Block,

Notary Public,

Saginaw County, Mich.

My commission expires 7/14/42.

EXHIBIT C.

April 15th, 1939.

SPECIAL DELIVERY.

Mr. Frederick J. Ward,
Attorney at Law,
1470 Balmoral Avenue,
Detroit, Michigan.
Re: 74013—Stevens v. Northway et al.

Dear Mr. Ward:

The motion to remand was argued before Judge Tuttle, and he followed about the same line of reasoning that I thought he would in this case. At first he was very much inclined to deny the motion and put up quite an argument, and it looked, for a while, as if I would not have to argue the case. However, after the other attorneys argued, and Mr. Wendrow was there, as well as Crane and Crane, he decided to remand the case, basing his decision on the case of Brucker v. Georgia Casualty Company and Russell v. General Accident, with which you are familiar. He was very definite in his opinion that Judge Hart should have signed the order of removal, and he seemed somewhat reluctant to remand the case, but he said that this was an ancillary proceeding, and if he was to allow the transfer, it would promote considerable confusion, and he analyzed the question very carefully.

In my opinion, we would get nowhere appealing from this decision, and we may as well handle it in the State Court, having in mind that we will probably get beat before Judge Hart, and have to appeal the case.

After the hearing on this motion, I talked with Mr. Wendrow, and he stated that he would consent to set aside the default, providing we did not put him to any further trouble in the Federal Court action. I informed him that I did not know just what we would do, but that I would get in touch with him after I had had an opportunity of taking the matter up with you.

Unless I hear from you to the contrary, I will enter into a stipulation on Monday, April 17, with Mr. Wen-

*Answer of the Principal Defendants to Plaintiff and
Appellee's Motion to Dismiss.*

drow, to set aside the default judgment, and then we can file another disclosure in the State Court and have the issue tried out.

In talking with Mr. Wendrow, he informed me of some things I did not know about. He stated that when the representation was made to the company that Fisher was employed by Dr. Northway, the premium was raised, and for that reason, Dr. Northway, had every reason to believe that he would be protected. I have never seen a copy of this policy or the application, and I would appreciate it if you would forward copy to me.

Mr. Wendrow further informed me that he had some letter which was very valuable in this case, but he refuses to reveal the contents or from whom he had received it. It, therefore, might be advisable to check up the entire underwriter's file and see if there is anything in it, which might be damaging,

Yours very truly,
H. Monroe Stanton.

HMS:rb.

**ANSWER OF THE PRINCIPAL DEFENDANTS TO
PLAINTIFF AND APPELLEE'S MOTION TO
DISMISS.**

Now comes R. A. Northway and Roy B. Fisher and R. A. Northway doing business under the assumed name of Northway Clinic and Hospital, principal defendants herein, in the above entitled matter and for answer to plaintiff and appellee's motion to dismiss the appeal taken by The Metropolitan Casualty Insurance Company, of

*Answer of the Principal Defendants to Plaintiff and
Appellee's Motion to Dismiss*

New York, a foreign corporation, garnishee defendant herein, states as follows:

The principal defendants state that notice of the Motion to Dismiss on the part of plaintiff and appellee was served in due time and that the answer of the garnishee defendant to plaintiff's motion to dismiss was received by the principal defendants on June 20, 1939.

1. As to Paragraph One these principal defendants admit that the general appeal taken by the garnishee defendant is not the proper method of reviewing said cause in this court. Principal defendants state that they were served by the garnishee defendant with a special appearance and motion to set aside the default during the proceedings in the Lower Court which was in part as follows:

"Now comes The Metropolitan Casualty Insurance Company of New York, a foreign corporation, garnishee defendant in the above entitled cause, and appears specially for the purpose of moving the court now here for an Order setting aside the default entered by said plaintiff on the 17th day of April, A. D. 1939, for the following reasons:"

Principal defendants state that the garnishee defendant by its said motion herein quoted did not move the trial court to set aside the judgment entered against the garnishee defendant on April 17, A. D. 1939, and that the garnishee defendant by its said motion did not move the trial court to set aside the default entered by plaintiff against the garnishee defendant on April 11, A. D. 1939. It, therefore, appears that even if the trial court had granted the garnishee defendant's motion as requested and herein stated that it would still have existing against the garnishee defendant a valid default entered on April 11, A. D. 1939, and a valid judgment entered on April 17, A. D. 1939. The garnishee defendant further admits in Paragraph Three of its answer to plaintiff's Motion pending in the Supreme Court that it does not rely on any error in the testimony taken at the time the default judgment was entered and it must therefore follow that on the testimony taken at the time judgment was entered against the garnishee defendant that the trial court was justified on the testimony in entering a valid judgment

*Answer of the Principal Defendants to Plaintiff and
Appellee's Motion to Dismiss*

against, the garnishee defendant and at this time the garnishee defendant has not moved or questioned the validity of the judgment entered on April 17, A. D. 1939. The motion by the garnishee defendant to set aside the default entered against it on April 17, A. D. 1939, being denied by the trial court, can only be reviewed by appeal in this court by an appeal in the nature of a mandamus which requires leave on the part of the garnishee defendant to appeal to this court and the garnishee defendant having failed to first obtain leave to appeal has not followed the prescribed procedure under the court rules and, therefore, the general appeal taken by the garnishee defendant as a matter of right should be dismissed by this court, all of which is respectfully submitted.

2. As to Paragraph Two, these defendants admit same. Further answering the principal defendants deny that the garnishee defendant has at any time moved to set aside the judgment entered against the garnishee on April 17, A. D. 1939.

3. As to Paragraph Three, principal defendants admit same. Further answering the principal defendants state that the failure of the garnishee defendants to supply a copy of the testimony taken at the time of the entry of the judgment on April 17, A. D. 1939, substantiates the contention of the principal defendants that the garnishee defendant has at all times failed to set aside or attempt to set aside the judgment entered on April 17, A. D. 1939, and that there is nothing for either the trial court or the Supreme Court to review at this time.

4. As to Paragraph Four the principal defendants admit same. Further answering the garnishee defendant has admitted that there is no error in the testimony upon which the judgment of April 17, A. D. 1939, was entered and there being a valid judgment now in force and effect against the garnishee defendant, there is nothing for the trial court or the Supreme Court to review by way of general appeal as a matter of right. Garnishee defendant, it is respectfully submitted, cannot on a general appeal as a matter of right review the order of the trial court in denying its motion to set aside the default of April 17, A. D. 1939, and has failed to obtain leave to appeal and an appeal in the nature of a mandamus in accordance with the Circuit Court Rules.

Affidavit of William E. Crane

5. As to Paragraph Five, the principal defendants admit same. Further answering the principal defendants deny that the garnishee defendant as a matter of right on a general appeal can review the order of the trial judge denying its motion to set aside the default of April 17, A. D. 1939.

6. As to Paragraph Six, the principal defendants admit same.

The answer of the principal defendants to the Motion of the plaintiff in the above entitled cause is based on the records and files in this court and the affidavit of William E. Crane, one of the attorneys for the principal defendants, hereto attached, and which refers to the Motion to set aside said default on the part of the garnishee defendant which is incorporated and made a part of said affidavit.

Dated this 20th day of June, A. D. 1939.

Crane & Crane,

Attorneys for Principal
Defendants.

Business Address:

308-309 Second National Bank Bldg.,

Saginaw, Michigan.

AFFIDAVIT OF WILLIAM E. CRANE.

(Title of Court and Cause.)

County of Saginaw—ss.

William E. Crane being first duly sworn, deposes and says that he is one of the attorneys for the principal defendants in the above entitled cause; that he was duly

Affidavit of William E. Crane

served with the Motion to Dismiss the garnishee defendant's appeal to the Supreme Court on the part of plaintiff and that on June 20, A. D. 1939, he received the garnishee defendant's answer to plaintiff's motion to dismiss and a brief; that he immediately communicated with the Honorable Jay Mertz, clerk of the Supreme Court, for leave to file an answer on the part of the principal defendants and that said request was granted on the part of said clerk.

Deponent states that he examined with care the special appearance and motion to set aside the default made by the garnishee defendant in the trial court and that hereto attached is a true and exact copy of said motion signed by Frederick J. Ward and H. Monroe Stanton, attorneys for said garnishee defendant. Deponent further states that in regard to the alleged agreement put forth on the part of the garnishee defendants wherein garnishee defendant's attorneys alleged that plaintiff's attorneys agreed to set aside said default, the same was passed on by the trial judge who found that there was no such agreement as will appear by the records and files in this cause. Deponent further states that garnishee defendant's attorneys were duly advised by Special Delivery letter dated April 11, 1939, that the plaintiff intended to enter judgment against the garnishee defendant on April 17, A. D. 1939 (Exhibit F for plaintiff) and deponent further states that on April 17, A. D. 1939, one of the attorneys for the garnishee defendant was in communication with the Honorable Ray Hart, Circuit Judge for the County of Isabella, by telephone, and that in the presence of this deponent a conversation was had between one of the attorneys for the garnishee defendant and the Honorable Ray Hart, Circuit Judge, relative to entry of the judgment on April 17, A. D. 1939, and that the Honorable Ray Hart, Circuit Judge, did then and there inform said attorney for the garnishee defendant that judgment would be entered against said garnishee defendant on said date and that the attorneys for said garnishee defendant made no request to be present and contest the entry of the judgment on April 17, A. D. 1939, and this deponent therefore submits that the garnishee defendant had full knowledge of the entry of the judgment on April

Order Denying Motion to Dismiss.

17, A. D. 1939, at the time thereof and that no sharp practice on the part of any of the attorneys took place and that the entry of said judgment was done in the regular and usual course in accordance with the rules and practices of the court.

Further deponent saith not.

William E. Crane.

Subscribed and sworn to before me
this 20th day of June, A. D. 1939.

Gertrude L. Smalling,

Notary Public,

Saginaw County, Michigan.

My commission expires March 22, 1940.

ORDER DENYING MOTION TO DISMISS.

At a session of the Supreme Court of the State of Michigan, held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the twenty-first day of June, in the year of our Lord one thousand nine hundred and thirty-nine.

Present: The Honorable Henry M. Butzel, chief justice; Howard Wiest, George E. Bushnell, Edward M. Sharpe, William W. Potter, Bert D. Chandler, Walter H. North, Thomas F. McAllister, associate justices.

In this cause a motion is filed by plaintiff to dismiss the appeal heretofore taken herein by garnishee defendant from the judgment of the Circuit Court for the County of Isabella, and papers in opposition thereto having been filed, and due consideration thereof having been had by the court, it is ordered that the motion to dismiss be and the same is hereby denied, and that a delayed appeal be and the same is hereby granted on the part of garnishee defendant.

OPINION.

Decided April 1, 1940. Rehearing ~~applied~~ for.

Wiest, J. Plaintiff had judgment in the Isabella Circuit Court against the principal defendants in an action for malpractice and, on March 8, 1939, sued out in that court a writ of garnishment against the Metropolitan Casualty Insurance Company of New York, requiring disclosure on or before March 31, 1939. The writ was regularly served, as provided by law, upon the commissioner of insurance. March 28, 1939, the garnishee petitioned the Circuit Court for removal of the proceedings to the Federal District Court by reason of diversity of citizenship, tendered bond, and, upon denial of removal, the attorneys for the garnishee served notice of removal to the Federal Court. After such notice, and on April 10th, disclosure by the garnishee denying indebtedness or liability was filed in the Federal Court. The Federal Court on April 15, 1939, remanded the proceeding to the State Court. In the meantime plaintiff entered the default of the garnishee in the State Court for want of appearance and disclosure in that court and, upon remand by the Federal Court, re-entered the default on April 17th, and, the same day, upon proofs in court, took judgment against the garnishee. April 18, 1939, the garnishee, under special appearance, moved the Circuit Court to set aside the default as prematurely entered, averred filing of the disclosure in the Federal Court denying liability and notice thereof to the attorneys for plaintiff before entry of the default and filed an affidavit of merits. The motion was denied, and this appeal followed.

The garnishment proceeding was ancillary to the action against the principal defendants and wholly dependent thereon and not the commencement of a independent action. *Wingarden v. LaHuis*, 251 Mich. 276.

The writ of garnishment was regular, proper service was made, and disclosure was required on or before March 31, 1939; and none was filed in the Circuit Court, and not in the Federal Court until April 10th.

Attorneys for the garnishee contend that, under Court Rule No. 27, Sec. 3 (1933), time to file disclosure was

Opinion

extended 15 days from April 11th, when the petition for removal to the Federal Court was denied and, therefore, the default was premature.

That rule relates to pleadings in original actions and suits and not to proceedings in garnishment wholly regulated by specific statutory provisions. The point urged is without merit.

The writ of garnishment was served on the commissioner of insurance, as provided by statute, and mailed to the garnishee on March 10, 1939, giving 21 days in which to appear and make disclosure.

It is claimed that, under Court Rule No. 27, Sec. 5 (1933), the garnishee had 30 days after service on the commissioner of insurance in which to file disclosure.

The mentioned rule provides:

"Where service of process against corporations is made upon the commissioner of insurance or secretary of state, the defendant shall not be required to appear or answer thereto until thirty days after the mailing of the copy of such process to such defendant by said commissioner of insurance or secretary of state."

If this rule is applicable to garnishments (a question we do not decide) it would not help the garnishee whose default, for want of appearance and disclosure, was entered on April 17th, or more than 30 days after the commissioner of insurance mailed the copy of the writ to the garnishee at its home office in New York City.

Considering the refusal of the Circuit Court to grant removal to the Federal Court and the remand by the Federal Court, the disclosure filed in the Federal Court was no compliance with the writ of garnishment.

In behalf of the garnishee it is claimed that the attorneys for plaintiff had a copy of the disclosure filed in the Federal Court and it was sharp practice to enter the default in the Circuit Court under such circumstances.

Counsel for plaintiff did no more than protect their client's rights, and it is not difficult to understand why they did not point out to opposing counsel their errors in the matter of their somewhat defiant attempt to remove the proceeding to the Federal Court.

The default and judgment thereunder were regular and there was no abuse of discretion on the part of the court.

Order

in abiding by the law. That the garnishee has not had its day in court is not attributable to counsel for plaintiff.

The action of the Circuit Court is affirmed, with costs to plaintiff.

Bushnell, C. J., and Sharpe, Potter, Chandler, North, McAllister and Butzel, JJ., concurred.

ORDER.

(Title of Court and Cause.)

At a session of the Supreme Court of the State of Michigan, held at the supreme court room, in the Capitol, in the city of Lansing, on the first day of April, in the year of our Lord one thousand nine hundred and forty.

Present: The Honorable George E. Bushnell, Chief Justice; Edward M. Sharpe, William W. Potter, Bert D. Chandler, Walter H. North, Thomas F. McAllister, Howard Wiest, Henry M. Butzel, Associate Justices.

The record and proceedings in this cause having been brought to this court by appeal from the Circuit Court for the County of Isabella, and the same, and the grounds of appeal specified therein, having been seen and inspected and duly considered by the court, and it appearing to this court that in said record and proceedings, and in the giving of judgment in said circuit court, there is no error, therefore it is ordered and adjudged that the judgment of said Circuit Court for the County of Isabella be and the same is hereby in all things affirmed, and that the plaintiff do recover of the appellant, his costs, to be taxed, and that he have execution therefor.

*Application for Rehearing of the Metropolitan Casualty
Insurance Company, Garnishee Defendant and Appellant*

SUPREME COURT OF MICHIGAN

*Appeal from Isabella Circuit Court.
Hon. Ray Hart, Circuit Judge.*

Frank Stevens,
Plaintiff and Appellee,

v.

R. A. Northway, doing business
under the assumed name of
Northway Clinic and Hos-
pital, R. A. Northway,
Roy B. Fisher,

Principal Defendants,
The Metropolitan Casualty In-
surance Company of New
York, a foreign corpora-
tion,
Garnishee Defendant
and Appellant.

Calendar No. 40692.

**APPLICATION FOR REHEARING OF THE METRO-
POLITAN CASUALTY INSURANCE COMPANY,
GARNISHEE DEFENDANT AND
APPELLANT.**

Comes now The Metropolitan Casualty Insurance Com-
pany of New York, garnishee defendant and appellant
in the above entitled cause, and applies for rehearing for
the reasons hereinafter set forth.

I.

The opinion of the court takes the position that this
cause was not properly removed to the United States
District Court for the Eastern District of Michigan,
Northern Division, because it was commenced as against
appellant as a garnishment proceeding ancillary to the
action against the principal defendants. While it is

Application for Rehearing of the Metropolitan Casualty Insurance Company, Garnishee Defendant and Appellant

true that the action was in form ancillary, the action is in substance independent and original as far as the appellant and garnishee defendant is concerned. The question whether it was bound to pay the judgment under its policy, was a question in no way involved in the original action and its nature is in no way changed because it was raised in an action in form ancillary instead of in an original action, as it clearly could have been. Whether such an action even though commenced as an ancillary proceeding is in substance an independent and original action and removable as such, is thoroughly considered in *Reed v. Bloom* (Maryland Casualty Company of Baltimore, Garnishee) (D. C. W. D. Olka., May 1, 1936), 15 F. Supp. 7, 8, from which we quote as follows:

"The plaintiff, Tom B. Reed, recovered a judgment against the defendant, Lloyd L. Bloom, in the District Court of Oklahoma County, Okla., on the 7th day of February, 1936, for injuries received in an automobile accident. After the rendition of said judgment, execution was issued against the defendant, Bloom; the execution being returned: 'No property found.' Thereafter garnishment proceedings were instituted against the garnishee, Maryland Casualty Company, a nonresident corporation, in aid of the execution, under Sections 500 and 501, O. S. 1931.

The garnishee answered said process, and within due time filed its petition to remove to this court. The plaintiff filed his motion to remand, and this matter comes on for hearing on the motion to remand.

It is the contention of the plaintiff that this action is so directly connected with the original suit as to be a part of the original suit, and that this proceeding is merely an action in aid of execution. The garnishee contends that the controversy between the plaintiff and the garnishee is in the nature of an independent action and is the same as a suit at law by the plaintiff against this garnishee.

There is no question in the court's mind but that the plaintiff has followed the procedure as provided

Application for Rehearing of the Metropolitan Casualty Insurance Company, Garnishee Defendant and Appellant

in the Oklahoma statutes. The question, however, to be determined is whether or not, regardless of the name of the proceeding, the action is independent and is an original action insofar as this garnishee is concerned.

It is admitted that the garnishee executed an indemnity policy in favor of the defendant in the original action, but its contention is that this policy does not cover the class of accidents in which the plaintiff was injured; that this question was not involved in the original suit, but constitutes an independent suit. * * *

It is admitted that, had the plaintiff brought an original action against the garnishee on the insurance policy, such action would have been removable from the state court to federal court. Clearly the only advantage that the plaintiff secured by virtue of his judgment against Bloom in the state court, insofar as the garnishee in this action is concerned, was the right to be substituted for Bloom as the beneficiary under the indemnity policy. The right to remove a cause to the federal court is controlled wholly by federal statutes; it being admitted that a state cannot enact a law which would affect the rights of a nonresident under the Constitution and the laws of the United States.

In *Terral v. Burke Construction Company*, 257 U. S. 529, 48 S. Ct. 188, 189, 66 L. Ed. 352, 21 A. L. R. 186, the court in discussing the right of a nonresident citizen to remove a cause to the federal court under the terms of the federal statute, said: 'It rests on the ground that the federal constitution confers upon citizens of one state the right to resort to federal courts in another, that state action, whether legislative or executive, necessarily calculated to curtail the free exercise of the right thus secured is void because the sovereign power of a state in excluding foreign corporations, as in the exercise of all others of its sovereign powers, is subject to the limitations of the supreme fundamental law.'

In *Donald v. Philadelphia & Reading Coal Com-*

Application for Rehearing of the Metropolitan Casualty Insurance Company, Garnishee Defendant and Appellant

pany, 241 U. S. 329, 36 S. Ct. 563, 564, 60 L. Ed. 1027, quoting from *Harrison v. St. Louis & San Francisco R. Company*, 232 U. S. 318, 34 S. Ct. 333, 58 L. Ed. 621, L. R. A. 1915 F., 1187, the court said: 'The judicial power of the United States as created by the Constitution and provided for by Congress pursuant to its constitutional authority is a power wholly independent of state action, and which therefore the several states may not, by any exertion of authority in any form, directly or indirectly, destroy, abridge, limit, or render inefficacious.'

In defining a 'suit,' in *Weston v. City Council of Charleston*, 2 Pet. 449, 464, 7 L. Ed. 481, Chief Justice Marshall said: 'The term is certainly a very comprehensive one, and is understood to apply to any proceeding in a court of justice, by which an individual pursues that remedy in a court of justice which the law affords him. The modes of proceeding may be various, but if a right is litigated between parties in a court of justice, the proceeding by which the decision of the court is sought is a suit. The question between the parties is precisely the same as it would have been in a writ of replevin, or in an action of trespass.'

In *Pacific Railroad Removal Cases*, 115 U. S. 1, 18, 5 S. Ct. 1113, 1124, 29 L. Ed. 319, the court, in considering certain issues which arose between a nonresident corporation in connection with other interested parties in an action pending in a state court, said: 'The proceedings for widening the street, pending in the state court, may have to await the decision of the case in the federal court; and the result of those proceedings may be materially affected by the decision of that case; but that consideration does not affect the separate and distinct character of the controversy between the city and the railway company, although it might raise a question of proper parties in a pure chancery proceeding as between the city and the company. This controversy is to all intents and purposes "a suit." The indirect effect upon the general proceedings for widening the street which would ensue in case the

Application for Rehearing of the Metropolitan Casualty Insurance Company, Garnishee Defendant and Appellant

federal court should determine that the city of Kansas had no right to widen the street in the company's depot grounds, or that the valuation of its property was much too small, or the assessment of benefits against it was much too large, furnishes no good reason for depriving the company of its right to remove its suit into a United States court. We think that the case was removable to that court under the act of March 3, 1875.'

In a much more recent case, *Commissioners of Road Imp. District v. St. Louis Southwestern R. Company*, 257 U. S. 547, 42 S. Ct. 250, 255, 66 L. Ed. 364, the court, in response to the contention that the proceeding could not be removed because the statutory proceedings could not have been originally instituted in the federal court, said: 'This limitation is not intended to exclude from the right of removal defendants in cases in the state court which, because of their peculiar form would be awkward as an original suit in a federal court, or would require therein a reframing of the complaint and different procedure. *Sheffield Furnace Company v. Witherow*, 149 U. S. 574, 579, 13 S. Ct. 936, 37 L. Ed. 853; *Fleitas v. Richardson*, No. 1, 147 U. S. 538, 544, 13 S. Ct. 429, 37 L. Ed. 272. The limitation is that only those proceedings can be removed which have the same essentials as original suits permissible in district courts; that is that they can be readily assimilated to suits at common law or equity, and that there must be diverse citizenship of the parties and the requisite pecuniary amount involved.'

In *Smith v. Adams*, 130 U. S. 167, 9 S. Ct. 566, 568, 32 L. Ed. 895, the court said: 'Whenever the claim or contention of a party takes such a form that the judicial power is capable of acting upon it, then it has become a case of controversy.'

In *Schuler v. Israel*, 120 U. S. 506, 7 S. Ct. 648, 650, 30 L. Ed. 707, it is said: 'As we understand the law concerning the condition of a garnishee in attachment, he has the same rights in defending himself against that process at the time of its service upon him that he would have had against the

Application for Rehearing of the Metropolitan Casualty Insurance Company, Garnishee Defendant and Appellant

debtor in the suit for whose property he is called upon to account.'

In *McLaughlin v. Swann*, 18 How. 217, 229, 15 L. Ed. 357, the court said: 'But in a state where the legal and equitable jurisdictions are distinct, and in a court of the United States, having full equity powers, we consider that a garnishee should stand as nearly as possible in the same position he would have occupied if sued at law by his creditor.' * * *

In *Davis v. Lilly*, 17 Okla. 579, 87 P. 302, 303, the Oklahoma Supreme Court, in discussing a suit in which the garnishee was made a party in the original action, said: 'In an action of this kind two distinct and different issues are presented. One between the plaintiff and defendant, and the other between the plaintiff and the garnishee.'

In *Tunstall v. Worthington*, Federal Case No. 14,239, in discussing the character of a garnishment proceeding, it was said: 'It is in every respect a suit in which the primary object is to obtain judgment against the garnishee, and certainly cannot with any plausibility be treated as process of execution, or as part of the execution process.'

In *Ward v. Congress Construction Company* (C. C. A. 7th Circuit), 99 F. 598, 602, in a suit in equity in a state court enjoining the erection of buildings on certain grounds, a motion was filed by the complainant for an order restraining a third person, who was not a party to the suit, from violating the decree. The third party, being a nonresident of the state, filed a petition and bond for removal of the case to the federal court. It was contended that the proceeding was ancillary to the original action and was not an independent suit which could be removed. The court said: 'But a party thus brought in, who was in no way bound by the original decree, it is evident, must be deemed to have the same right to ask a removal as if he had been made a party at first; and, indeed, a better right, since there can arise no question of the separability of his interest from those of the original defendants.'

Application for Rehearing of the Metropolitan Casualty Insurance Company, Garnishee Defendant and Appellant

The court in its opinion further said: 'While the proceeding now in question evidently was intended to be auxiliary to the decree of the state court, and was so in form, yet in fact, *ratione materiae*, it was not of that character.'

The plaintiff in this action relies largely upon an opinion by Judge Kennamer of the Northern District of Oklahoma, *Lahman v. Supernew et al.* (Indemnity Ins. Company of North America, Garnishee) (D. C.), 47 F. (2d) 610, decided February 10, 1931, in which Judge Kennamer held that a garnishment proceeding, such as has been instituted by the plaintiff, was not an independent action, but was a proceeding in aid of execution. Much as I respect the judgment of my learned friend Judge Kennamer, I cannot agree with his conclusions in that case. He also cites a case from the Eastern District of Missouri by District Judge Davis, *Brucker v. Georgia Casualty Company* (D. C.), 14 F. (2d) 688. I have read this opinion very carefully and, while there is a difference between the Oklahoma statutes and the Missouri statutes, I cannot follow the conclusions reached in that case.

The mere fact that the plaintiff in this case preferred to bring a garnishment proceeding against the garnishee in this case, instead of filing an independent suit against the garnishee, does not change the position of the garnishee as to its rights to remove the cause to the federal court.' * * *

This court is not inclined to increase the business of the federal court in this district, but an emergency arising from an overcrowded docket is not sufficient to justify a denial of the constitutional right of the garnishee. The motion to remand will be overruled and an exception allowed."

The Michigan statute applicable to the trial of actions against garnishee defendants is substantially like the Oklahoma statute cited in the foregoing case and clearly contemplates that as between the plaintiff and the garnishee defendant all the incidents of an original action are present, *Michigan C. L. 1929, Sec. 14867, Mich. Stat. Ann., Section 27.1865*. It provides that the affidavit for

Application for Rehearing of the Metropolitan Casualty Insurance Company, Garnishee Defendant and Appellant

the writ shall be held and considered as a declaration by the plaintiff against the garnishee defendant, and provides how the issues shall be framed for the trial of the question of the garnishee's liability. The right to a trial by jury, if requested, is specifically included. As stated by the District Court of Oklahoma, the substance and not the form is the thing to be considered. The mere fact that this suit was in form ancillary did not make it any the less an independent and original action insofar as the determination of appellant's liability on its policy was concerned. We submit that the decision in *Reed v. Bloom*, supra, is thoroughly sound and that this cause was not deprived of its character as a removable case merely because it was in form ancillary to a controversy which had previously been finally determined. No other question is presented as to removability. Diversity of citizenship was present, together with the jurisdictional amount and the petition and bond were properly filed after notice. While the action of the District Court in remanding is not reviewable but final, it by no means follows that nonremovability was adjudicated for all purposes. Authorities dealing with the question hold merely that remand effectively and finally divests the District Court of further jurisdiction. Whether this is retroactive we shall consider hereinafter.

II:

It is fundamental and thoroughly settled that the filing of a proper petition for removal and bond after notice and within the proper time, divests a state court of jurisdiction to proceed further regardless of whether any order is made by the state court. The rule is stated as follows in *Morgan v. Kroger Grocery and Baking Company* (C. C. A. 8), 96 Fed. (2d) 470, 472:

"Ordinarily, the filing of a proper petition and bond for removal deprives the state court of jurisdiction and confers jurisdiction upon the federal court. *Kingston v. American Car & Foundry Company*, 8 Cir., 55 F. (2d) 132; *Janoske v. Porter*, 7 Cir., 64 F. (2d) 958. The fact that the state court declined to sign the order of removal, or the fact that it signed an order denying the petition for

Application for Rehearing of the Metropolitan Casualty Insurance Company, Garnishee Defendant and Appellant

removal, would not affect the jurisdiction of the federal court, if in fact, the cause were removable."

While jurisdiction in the state court may be regained as a result of remand, the jurisdiction in the meantime, if as we contend the cause was in fact removable, would necessarily be in the federal court alone. It necessarily follows that any action in the state court during the interim, would be of no force and effect. Many authorities are cited in 54 Corpus Juris 343, to the following statement:

"Where a right to remove a cause from a state court to a federal court exists, and a removal is properly effectuated, the state court is thereby divested of jurisdiction; and it has no power to proceed further, save to enter an order of removal, unless and until the cause is thereafter remanded by the federal court. Pending any such remand, therefore, or if the cause is not remanded, any further proceedings had or orders made there by such state court are not merely erroneous, but coram non judice and absolutely void."

In *Bishop & Babcock Sales Company of Ohio v. Lackman* (Tex. C. A.), 4 S. W. (2d) 109, it was held that where a cause has been removed to the federal court even though thereafter remanded, the state court has no jurisdiction in the meantime, and that the time when defendant would otherwise be required to answer is extended until after the remand, the court said:

"After the suit was removed to the federal court and during its pendency in that court, the state court had no jurisdiction of it and the defendant was not required to file an answer in that court even to the merits of the case. The citation issued in the state court required the defendant to appear at the October term, and since the case was not in that court during that term, necessarily the defendant was not required to answer until after the remand of the case to that court. After the case was remanded the first appearance term of the state court was the May term, and prior to the beginning of that term the plea of privilege was filed. It would be unreasonable to hold that an answer to the merits

Application for Rehearing of the Metropolitan Casualty Insurance Company, Garnishee Defendant and Appellant

and a cross-action filed by the defendant in the federal court would be a waiver of the right to file a plea of privilege in the state court later."

It follows that if the cause was removable, the default entered on April 10th, 1939, at a time when the cause was still pending in the District Court, was wholly void and could not constitute a basis for a later judgment rendered thereon. While there is little authority dealing with the question of whether a remand restores jurisdiction retroactively, there is at least some substantial authority that it does not. In *Roberts v. C. St. P. M. & O. Ry. Company (Minn.)*, 51 N. W. 478, a petition for removal to the Federal Court was filed in the clerk's office but not presented to the court. A certified copy of the record was then obtained and filed in the Federal Court, but this was not called to the attention of the judge. The defendant was defaulted and later attempted to have the default set aside. In the meantime the Federal Court remanded the cause. While the court refused to set aside the default for the reason that it considered the mere filing with the clerk insufficient to remove the cause, it plainly recognized that had the petition been properly presented, the remand would have no retroactive effect in bolstering the court's want of jurisdiction in the interim. The court there said:

"Nor can it affect the validity of the judgment that the case was subsequently remanded to the state court, it being considered by the circuit court that the attempted removal had not been effectual. Of course, that decision of the circuit court is to be regarded as authority upon the question whether the proceedings for removal were effectual; but the remanding of the cause had no retroactive effect as respects the jurisdiction of the state court prior thereto."

III.

If in fact the cause was a removable one, the state court lost jurisdiction prior to March 31, 1939, and the appellant on April 10, 1939, filed in a court then having exclusive jurisdiction of the parties and subject matter,

Application for Rehearing of the Metropolitan Casualty Insurance Company, Garnishee Defendant and Appellant

its appearance and disclosure. The state court had not regained jurisdiction by remand at that time. The federal court had not yet relinquished it by remand. At the time the state court regained jurisdiction, and immediately proceeded to enter a default judgment, the disclosure had been actually filed in a court having at the time, exclusive jurisdiction, being in fact the only court where any valid step could then be taken. We submit that this court is in error in denying the disclosure so filed any force and effect, if by reason of removability of the cause the district court had jurisdiction at the time, notwithstanding it relinquished it thereafter. We submit that since the remand has no retroactive effect, papers filed and steps taken in the federal court are not nullities unless the cause is one where from the inception no right of removal existed. The question in reality, therefore, comes back to whether the cause was removable, the only contention to the contrary being that its character as an ancillary proceeding prevents this.

As already demonstrated in *Reed v. Bloom* (Maryland Casualty Company, Garnishee), *supra*, this overlooks the realities of the situation.

IV.

We do not believe the steps taken in this case by appellant's counsel can be fairly classified as defiant. An attorney who believes that he has a removable cause where the state court denies the right of removal, has two well recognized methods of presenting the question. One is to proceed in the state court and finally go to the Supreme Court of the United States if the highest court of the state decides against him. The other is to procure a transcript and file it in the United States Court. The latter practice is undoubtedly far more common than the former and fairer to the adversary, since it prevents him from running the risk of having all of his litigation to no purpose, if the cause should have been removed. If there has been any general criticism of this practice, it has not come to our attention.

Application for Rehearing of the Metropolitan Casualty Insurance Company, Garnishee Defendant and Appellant

V.

The questions as to the effect of the removal proceeding and the steps taken therein, involve wholly the construction of the federal statutes pertaining thereto, and we submit that such federal questions have been incorrectly decided by the trial court and by this court. We further submit that the judgment in this cause as affirmed by this court, has erroneously denied appellant its day in court, and thereby taken its property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States. In effect appellant has been denied an opportunity to be heard on the merits because it asserted in good faith that a right to remove the cause existed and took appropriate steps to attempt to establish its contention. If the cause was removable, appellant at all times took the only steps available in the only court where at the time they could be taken, and at the time it was defaulted had taken all steps, in a court which then had jurisdiction, necessary to have prevented a default, if taken in the state court. Appellees could have suffered neither harm nor unreasonable delay by being required to establish their right in an adversary proceeding on the merits. Whether counsel for plaintiff have as the court states, merely protected their clients' rights or whether they have been able to secure a result entirely beyond their rights, can never be determined on the merits if this judgment stands. We submit that a rehearing should be granted and that on such rehearing, the cause should be reversed and the trial court directed to set aside the default and hear and determine the cause on the merits.

Respectfully submitted,

FREDERICK J. WARD,
H. MONROE STANTON,
Attorneys for Appellant.

ALAN W. BOYD,
Of Counsel.

Order Denying Motion for Rehearing

ORDER DENYING MOTION FOR REHEARING.

(Filed June 18, 1940.)

(Title of Court and Cause.)

At a session of the Supreme Court of the State of Michigan, held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the eighteenth day of June in the year of our Lord one thousand nine hundred and forty.

Present: The Honorable George E. Bushnell, Chief Justice; Edward M. Sharpe, William W. Potter, Bert D. Chandler, Walter H. North, Thomas F. McAllister, Howard Wiest, Henry M. Butzel, Associate Justices.

A motion for rehearing having been heretofore submitted herein, it is hereby denied with costs to plaintiff.

State of Michigan—ss.

I, Jay Mertz, clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 26th day of July in the year of our Lord one thousand nine hundred and forty.

Jay Mertz,
Clerk.

(Seal.)

Order Staying Execution

ORDER STAYING EXECUTION.

(Filed June 24, 1940.)

(Title of Court and Cause.)

At a session of said court held in the city of Detroit, Michigan, on the 24th day of June, 1940.

Present: Honorable Henry M. Butzel, Chief Justice.

On reading and filing the verified petition of The Metropolitan Casualty Insurance Company of New York, a foreign corporation, garnishee defendant and appellant in the above entitled cause, and the court being fully advised in the premises, on motion of Frederick J. Ward and H. Monroe Stanton, attorneys for the garnishee defendant and appellant, Alan W. Boyd, of counsel,

It is ordered that a stay of execution and of the enforcement of judgment in the above cause be granted to the above named garnishee defendant and appellant, The Metropolitan Casualty Insurance Company of New York, conditioned upon the filing in this cause of a good and sufficient surety bond in the amount of fifteen (\$15,000.00) thousand dollars, which bond shall provide that if said garnishee defendant and appellant shall fail to make application for writ of certiorari to the Supreme Court of the United States within ninety (90) days from the 19th day of June, 1940, or shall fail to obtain the order of such court granting such application, or shall fail to make its plea good in the Supreme Court, it shall answer for all damages and costs which plaintiff, Frank Stevens, may sustain by reason of such stay. Such bond shall be filed and approved by this court on or before the 10th day of July, A. D. 1940.

Henry M. Butzel,
Associate Justice.

*Petition for Stay of Process***PETITION FOR STAY OF PROCESS.**

(Filed June 24, 1940.)

(Title of Court and Cause.)

Now comes the Metropolitan Casualty Insurance Company of New York, a foreign corporation, garnishee defendant and appellant, by its duly authorized attorneys and counsel, and shows unto this Honorable Court as follows:

1. That the judgment entered in the Circuit Court, from which petitioner took its appeal, was affirmed by this court, and that a petition for rehearing filed by this petitioner was denied.

2. That petitioner deems itself aggrieved by the said decisions of this Honorable Court, and has been advised by counsel that a Federal question is involved, by virtue of which the Supreme Court of the United States of America would have jurisdiction.

3. That your petitioner has therefore resolved to perfect an appeal to the Supreme Court of the United States of America, but that it is necessary that while that appeal is being perfected and pending a decision thereon, no process by way of execution or otherwise issue against this petitioner, and that to that end petitioner is ready, willing and able to furnish a good and sufficient bond to the appellees in this cause in such amount and upon such terms as this court may determine.

Wherefore, your petitioner prays that this court order that the issuance of process against petitioner be stayed, whether such process be by way of execution or otherwise, such stay to terminate if petitioner shall not have filed a bond on or before such date as this court may set.

And your petitioner will ever pray.

The Metropolitan Casualty Insurance
Company of New York, a Foreign
Corporation,

Frederick J. Ward,

By Frederick J. Ward,

.....
H. Munroe Stanton,

Attorneys for Garnishee
Defendant and Appellant,
Petitioner.

Alan W. Boyd,
Of Counsel.

Petition for Stay of Process

State of Michigan,
County of Wayne—ss.

On this 24th day of June, A. D. 1940, before me, a notary public in and for said county, personally appeared Frederick J. Ward, to me known to be the person who subscribed to the foregoing petition on behalf of The Metropolitan Casualty Insurance Company of New York, and who made oath that he has authority so to do; that he has read the same, knows the contents thereof and that the same are true of his own knowledge, except as to the matters therein stated to be on information and belief, and as to those matters he believes it to be true.

Erma Crigler,

Notary Public,

Wayne County, Mich.

My commission expires February 7, 1944.

Notice of Submitting Stay Bond for Approval

**NOTICE OF SUBMITTING STAY BOND FOR
APPROVAL.**

(Title of Court and Cause.)

To Frank Stevens,
Plaintiff and Appellee,
To B. A. Wendrow and
Worcester & Worcester,
Attorneys for Plaintiff,
To R. A. Northway, doing business
under the assumed name of
Northway Clinic and Hospital,
R. A. Northway, Roy B. Fisher,
Principal Defendants,
To Crane & Crane,
Attorneys for Principal Defendants.

You will please take notice that the Stay Bond required by the Order of the Supreme Court of the State of Michigan, issued on the 24th day of June, 1940, in the above captioned matter, true copy of which Bond is attached hereto, will be presented for approval to the Supreme Court of the State of Michigan, at its court room in the Capitol Building in the City of Lansing, State of Michigan, or to the judges thereof, in Chambers, on Tuesday, the 9th day of July, 1940, at 10:00 a. m. in the forenoon, or as soon thereafter as counsel can be heard.

Frederick J. Ward,
H. Munroe Stanton,
Alan W. Boyd,
Attorneys for Garnishee
Defendant and Appellant.

July 2, 1940.

*Proof of Service of Notice of Submitting Stay Bond
for Approval*

**PROOF OF SERVICE OF NOTICE OF SUBMITTING
STAY BOND FOR APPROVAL.**

(Title of Court and Cause.)

State of Michigan,
County of Wayne—ss.

Robert E. Plunkett, being first duly sworn, deposes and says, that he is an attorney at law and associated with Frederick J. Ward, one of the attorneys of record for the garnishee defendant and appellant in the above captioned matter. That on Tuesday, the 2nd day of July, 1940, deponent served the annexed notice of submitting stay bond for approval upon Frank Stevens, plaintiff, and B. A. Wendrow, and Worcester and Worcester, attorneys for plaintiff, and upon R. A. Northway, doing business under the assumed name of Northway Clinic and Hospital, R. A. Northway, Roy B. Fisher, principal defendants, and Crane and Crane, attorneys for principal defendants, by enclosing a true copy of said notice with a true copy of the proposed bond attached, in envelopes addressed to the said B. A. Wendrow and Worcester and Worcester, attorneys for said plaintiff, and to Crane and Crane, attorneys for said principal defendants, respectively, at their respective office and post office addresses, and depositing said envelopes, properly sealed, in the post office at the city of Detroit, state of Michigan, postage prepaid.

Further deponent sayeth not.

Robert E. Plunkett.

Subscribed and sworn to before me
this 2nd day of July, A. D. 1940.

Mabelle I. Vallire,

Notary Public,

Wayne County, Mich.

My commission expires 5-21-43.

*Objections to Stay Bond***OBJECTIONS TO STAY BOND.**

(Title of Court and Cause.)

Now comes Frank Stevens, the above named plaintiff and appellee, by B. A. Wendrow and Worcester & Worcester, his attorneys, and objects to the approval of the stay bond dated July 2, 1940, submitted by the above named garnishee defendant, The Metropolitan Casualty Insurance Company of New York, a foreign corporation, and to be presented for approval to the Supreme Court of Michigan on July 9, 1940, for the following reasons:

1. Because said proposed bond is insufficient and unsatisfactory for the reason that said bond does not contain, nor is there attached thereto, nor is there now in the file in said cause, any writing or other legally sufficient evidence showing the authority of Frederick J. Ward to execute said bond on behalf of, and to obligate said garnishee defendant, The Metropolitan Casualty Insurance Company of New York, a foreign corporation.

2. Because said proposed bond is insufficient and unsatisfactory for the reason that said bond does not contain, nor is there attached thereto, nor is there now on file in said cause, any certificate, writing or other legally sufficient evidence showing the authority of H. A. Davidson to execute said bond on behalf of, and to obligate the surety named therein, to-wit, the Commercial Casualty Insurance Company, a foreign corporation.

Respectfully submitted,

(Signed) B. A. Wendrow,

(Signed) Worcester & Worcester,
Attorneys for Plaintiff,

Dated this 5th day of July, 1940.

Business Address:

Commercial Building,
Mt. Pleasant, Michigan.

BOND.

Know all men by these present, that we, Metropolitan Casualty Insurance Company of New York, a foreign corporation, as principal, and Commercial Casualty Insurance Company, a foreign corporation, as surety, are held and firmly bound unto Frank Stevens, in the full and just sum of fifteen thousand (\$15,000.00) dollars, to be paid to the said Frank Stevens, his heirs, executors, administrators, successors or assigns, to which payment well and truly to be made we bind ourselves, our successors, representatives and assigns, jointly and severally, by these presents, sealed with our seals and dated this 2nd day of July, 1940.

Whereas, lately in the Supreme Court of the State of Michigan, in a suit pending in said court between Frank Stevens, as plaintiff and appellee, and R. A. Northway, doing business under the assumed name of Northway Clinic and Hospital, R. A. Northway, Roy B. Fisher, principal defendants, and appellee, and The Metropolitan Casualty Insurance Company of New York, a foreign corporation, garnishee defendant and appellant, judgment was rendered against the said The Metropolitan Casualty Insurance Company of New York, and

Whereas, the said Metropolitan Casualty Insurance Company of New York has petitioned for and been granted an order staying execution pending the filing of its petition with the Supreme Court of the United States, for a writ of certiorari, directed to the Supreme Court of the State of Michigan,

Now therefore, the condition of this obligation is such that if the said The Metropolitan Casualty Insurance Company of New York shall file its petition for a writ of certiorari with the Supreme Court of the United States within ninety (90) days from the nineteenth day of June, 1940, and shall obtain from the United States Supreme Court its writ of certiorari in said matter, directed to the Supreme Court of the State of Michigan, and shall make good its plea in the Supreme Court of the United States and shall answer for all damages and costs, which the said plaintiff, Frank Stevens, may sustain by reason

Bond

of such order staying execution, then this obligation to be void, otherwise to remain in full force and effect.

Metropolitan Casualty Insurance

Company of New York,

By Frederick J. Ward,

Attorney.

(Seal)

Commercial Casualty Insurance

Company,

By H. A. Davidson,

Attorney-in-Fact.

(Seal)

The within bond is hereby approved this 9th day of July, 1940, and when filed is to operate as a supersedeas.

Henry M. Butzel,

Associate Justice,

Supreme Court of the

State of Michigan.

*Clerk's Certificate.***CLERK'S CERTIFICATE.**

In the Supreme Court of the State of Michigan.

State of Michigan—ss.

I, Jay Mertz, clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of record and proceedings in the case of Frank Stevens, plaintiff and appellee, versus R. A. Northway, doing business under the assumed name of Northway Clinic and Hospital, R. A. Northway, Roy B. Fisher, principal defendants, and The Metropolitan Casualty Insurance Company of New York, a foreign corporation, garnishee defendant and appellant, calendar number 40692 as the same remains upon the files and records of said Supreme Court of the State of Michigan, and of the whole thereof.

In testimony thereof, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 9th day of August, A. D. 1940.

Jay Mertz,
Clerk of the Supreme Court of
the State of Michigan,
By Hugh T. Carpenter,
Deputy Clerk.

(Seal.)

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 28, 1940

The petition herein for a writ of certiorari to the Supreme Court of the State of Michigan is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

BLANK PAGE

SEP 12

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

FRANK STEVENS,

Respondent,

v.

R. A. NORTHWAY, Doing Business Under
the Assumed Name of Northway Clinic
and Hospital, R. A. NORTHWAY, ROY B.
FISHER,

Principal Defendants,

THE METROPOLITAN CASUALTY INSURANCE
COMPANY OF NEW YORK, a foreign cor-
poration,

Petitioner.

No. 425

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF MICHIGAN,
WITH SUPPORTING BRIEF.

FREDERICK J. WARD,
1117 Dime Bank Building,
Detroit, Michigan.

H. MONROE STANTON,
Saginaw, Michigan,

ALAN W. BOYD,
130 E. Washington Street,
Indianapolis, Indiana.

Attorneys for Petitioner.

BLANK PAGE

SUBJECT INDEX

Petition—

	Page
I SUMMARY STATEMENT OF THE MATTER INVOLVED	2
II REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT	3

Brief—

I OPINION OF THE COURT BELOW	10
II JURISDICTION	10
III STATEMENT OF THE CASE	10
IV ASSIGNMENTS OF ERROR	10
V SUMMARY OF ARGUMENT	11

Argument—

The controversy between petitioner and respondent while in form an action of garnishment was in substance a new and independent controversy and as such removable to the Federal Court 12

The cause was effectively removed and the State Court lost jurisdiction prior to the time petitioner was required to appear and answer in the State Court and was without jurisdiction at the time petitioner was defaulted. Such action was therefore void 21

Jurisdiction was regained by the State Court by the remand but was not restored retroactively and the prior default was not rendered valid thereby. At the time of the remand petitioner had appeared in the court then having jurisdiction of the cause and filed its disclosure. Such action could not be treated by the State Court as a nullity even though the order of remand is final as to further proceedings in the Federal Court.....

22

The policy of Congress in denying review of an order of remand is to avoid delay in the progress of the cause. Such purpose does not require that the interim proceedings be considered a nullity where the cause was in fact removable and where the result would be to penalize the assertion of a federal right

24

Appendix

26

ALPHABETICAL TABLE OF CASES AND STATUTES CITED

Page

CASES

American Automobile Ins. Co. v. Freundt (C. C. A. 7), 103 Fed. (2d) 613.....	20
Bankers Securities Corp. v. Insurance Equities Corp. (C. C. A. 3), 85 Fed. (2d) 856.....	24
Bishop & Babcock Sales Company of Ohio v. Lackman (Tex. C. A.), 4 S. W. (2d) 109.....	22
Ex Parte Bopst (C. C. A. 4), 95 Fed. (2d) 828.....	24
Lahman v. Supernaw (D. C. N. D. Okla.), 47 Fed. (2d) 610	19
Lawley v. Whiteis (D. C. N. D. Okla.), 24 Fed. Supp. 698	19
London & Lancashire Indemnity Co. v. Courtney (C. C. A. 10), 106 Fed. (2d) 277.....	19
Morgan v. Kroger Grocery and Baking Co. (C. C. A. 8), 96 Fed. (2d) 420.....	21
Reed v. Bloom (D. C. W. D. Okla.), 15 Fed. Supp. 7.....	12
Roberts v. C., St. P., M. & O. Ry. Co. (Minn.), 51 N. W. 478	23
Toney v. Maryland Casualty Co. (D. C. W. D. Va.), 29 Fed. Supp. 785.....	20

STATUTES

	Page
28 U. S. C. A. Sec. 71; Jan. 20, 1914, c. 11, 38 Stat. 278....	4
Mich. C. L. 1929, Sec. 14867 Mich. Stat. Ann. Sec. 27-1865	26

TEXT BOOK

54 Corpus Juris, 343.....	22
---------------------------	----

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

FRANK STEVENS,

Respondent,

v.

R. A. NORTHWAY, Doing Business Under
the Assumed Name of Northway Clinic
and Hospital, R. A. NORTHWAY, ROY B.
FISHER,

No.

Principal Defendants,

THE METROPOLITAN CASUALTY INSURANCE
COMPANY OF NEW YORK, a foreign cor-
poration,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF MICHIGAN,
WITH SUPPORTING BRIEF.

May it Please the Court:

The petition of The Metropolitan Casualty Insurance
Company of New York respectfully presents to this Honorable
Court:

SUMMARY STATEMENT OF THE MATTER INVOLVED

Prior to March 8, 1939, the respondent recovered a judgment against the principal defendants in the Isabella Circuit Court of the State of Michigan and on that date filed an affidavit for a writ of garnishment after judgment and obtained the issuance of such writ requiring the petitioner herein as garnishee defendant to appear on or before March 31, 1939, and file a disclosure in writing under oath concerning its liability as garnishee of the principal defendants. On March 28, 1939, petitioner pursuant to prior notice (R., p. 9) filed its petition to remove said cause to the District Court of the United States for the Eastern District of Michigan, Northern Division. The petition alleged diversity of citizenship as between petitioner, a citizen of New York, and respondent, a citizen of Michigan, and the existence of a separable controversy as between them involving an amount in excess of jurisdictional requirements (R., pp. 10 to 12). A proper bond in due form was filed at the same time (R., p. 13). On April 10, 1939, a transcript was filed in the District Court of the United States for the Eastern District of Michigan, Northern Division, and a disclosure under oath was filed in said court by the petitioner, denying any indebtedness or liability to the principal defendants or respondent. The disclosure admitted the issuance to the principal defendant, R. A. Northway, of a liability policy covering malpractice and asserted that such policy did not cover any liability of Northway arising out of the operation of a clinic and consequently did not cover the liability on which the judgment against the principal defendants was based (R., p. 66). On April 11, 1939, subsequent to the filing of such transcript and disclosure, the state court denied the petition

for removal and entered an order defaulting petitioner on the ground of failure to appear and file its disclosure and referring said cause to the court for assessment of damages (R., p. 19). On April 15, 1939, the district court ordered the cause remanded, which order was filed in the state court on April 17, 1939, (Sunday having intervened) and on that date the state court entered a second order defaulting petitioner for failure to appear and file a disclosure (R., p. 27) and entered judgment on said default in the sum of \$10,418.30 and costs (R., p. 54). On the following day, petitioner moved to set aside the default (R., p. 62), which motion was denied (R., p. 100). This action was affirmed on appeal to the Supreme Court of Michigan and this petition seeks a review of said judgment. The opinion is found in the record at pp. 187 to 189. It is reported in 291 N. W. 211.

II

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT

Petitioner's position may be summarized as follows: The garnishment proceeding commenced against petitioner after judgment against the principal defendants though ancillary in form was essentially a new and independent controversy between petitioner and respondent, and since all other elements essential for removal were present said cause was removable notwithstanding its form. The cause being removable was effectively removed by the filing of its petition and bond after notice, and the state court was thereby without jurisdiction thereafter until such jurisdiction was regained by the remand. The default entered in the meantime on April 11, 1939, was null and void and petitioner's disclosure filed in the district court on April 10, 1939, was filed in the only court having at the time

jurisdiction of the cause. Conceding that the state court regained jurisdiction by virtue of the remand, such order had no retroactive effect if the cause was one properly removable under the statutes of the United States pertinent thereto. (Title 28, Sect. 71, U. S. C. A., Jan. 20, 1914, c. 11; 38 Stat. 278.) At the time the default judgment was entered on April 17, 1939, for want of appearance and disclosure, petitioner had appeared and filed such disclosure in the only court having jurisdiction of the cause at the time thereof. The judgment of the trial court, the overruling of the motion to set aside the default, and the affirmance by the Supreme Court of Michigan failed and refused to accord legal effect to the disclosure so filed and thereby denied petitioner rights given by the statutes of the United States pertaining to the removal of causes. As a result petitioner was denied its day in court and thereby deprived of its property without due process of law in violation of Article 14 of the Articles in Amendment of the Constitution of the United States.

The motion to set aside the default judgment specified the removal of said cause to the District Court of the United States for the Eastern District of Michigan, Northern Division, by the filing of the petition and bond in the state court on March 28, 1939, the filing of the transcript in the federal court on April 10, 1939, the filing of the disclosure in said court and the service thereof upon respondent (R., pp. 62, 63). Said motion contained further the following specifications:

12. That at the time the default papers were filed herein, said cause of action had been transferred to the District Court of the United States, Eastern District of Michigan, Northern Division, and that this court had no jurisdiction over said action.

13. That the default filed herein was irregularly entered.

14. That the garnishee defendant herein did file a disclosure in the District Court of the United States, Eastern District of Michigan, Northern Division, on April 10, A. D. 1939, and a copy of said disclosure was served on the plaintiff herein, by mailing a true copy of same, postage fully prepaid, to the plaintiff's attorney, B. A. Wendrow, on April 14, A. D. 1939.

The Supreme Court of Michigan considered and decided the questions here specified in the opinion which is as follows:

OPINION

Decided April 1, 1940. Rehearing applied for.

Wiest, J., plaintiff, had judgment in the Isabella Circuit Court against the principal defendants in an action for malpractice and, on March 8, 1939, sued out in that court a writ of garnishment against the Metropolitan Casualty Insurance Company of New York, requiring disclosure on or before March 31, 1939. The writ was regularly served, as provided by law, upon the commissioner of insurance. March 28, 1939, the garnishee petitioned the Circuit Court for removal of the proceedings to the Federal District Court by reason of diversity of citizenship, tendered bond, and, upon denial of removal, the attorneys for the garnishee served notice of removal to the Federal Court. After such notice, and on April 10th, disclosure by the garnishee denying indebtedness or liability was filed in the Federal Court. The Federal Court on April 15, 1939, remanded the proceeding to the State Court. In the meantime plaintiff entered the default of the garnishee in the State Court for want of appearance and disclosure in that court and, upon remand by the Federal Court, re-entered the default on April 17th, and, the same

day, upon proofs, in court, took judgment against the garnishee. April 18, 1939, the garnishee, under special appearance, moved the Circuit Court to set aside the default as prematurely entered, averred filing of the disclosure in the Federal Court denying liability and notice thereof to the attorneys for plaintiff before entry of the default and filed an affidavit of merits. The motion was denied, and this appeal followed.

The garnishment proceeding was ancillary to the action against the principal defendants and wholly dependent thereon and not the commencement of a independent action. *Wynngarden v. La-Huis*, 251 Mich. 276.

The writ of garnishment was regular, proper service was made, and disclosure was required on or before March 31, 1939; and none was filed in the Circuit Court and not in the Federal Court until April 10th.

Attorneys for the garnishee contend that, under Court Rule No. 27, Sec. 3 (1933), time to file disclosure was extended 15 days from April 11th, when the petition for removal to the Federal Court was denied and, therefore, the default was premature.

That rule relates to pleadings in original actions and suits and not to proceedings in garnishment wholly regulated by specific statutory provisions. The point urged is without merit.

The writ of garnishment was served on the commissioner of insurance, as provided by statute, and mailed to the garnishee on March 10, 1939, giving 21 days in which to appear and make disclosure.

It is claimed that, under Court Rule No. 27, Sec. 5 (1933), the garnishee had 30 days after service on the commissioner of insurance in which to file disclosure.

The mentioned rule provides:

'Where service of process against corporations is made upon the commissioner of insurance or secretary of state, the defendant shall not be required to appear or answer thereto until thirty days after the mailing of the copy of such process to such defendant by said commissioner of insurance or secretary of state.'

If this rule is applicable to garnishments (a question we do not decide) it would not help the garnishee whose default, for want of appearance and disclosure, was entered on April 17th, or more than 30 days after the commissioner of insurance mailed the copy of the writ to the garnishee at its home office in New York City.

Considering the refusal of the Circuit Court to grant removal to the Federal Court and the remand by the Federal Court, the disclosure filed in the Federal Court was no compliance with the writ of garnishment.

In behalf of the garnishee it is claimed that the attorneys for plaintiff had a copy of the disclosure filed in the Federal Court and it was sharp practice to enter the default in the Circuit Court under such circumstances.

Counsel for plaintiff did no more than protect their client's rights, and it is not difficult to understand why they did not point out to opposing counsel their errors in the matter of their somewhat defiant attempt to remove the proceeding to the Federal Court.

The default and judgment thereunder were regular and there was no abuse of discretion on the part of the court in abiding by the law. That the garnishee has not had its day in court is not attributable to counsel for plaintiff.

The action of the Circuit Court is affirmed, with costs to plaintiff. (R., pp. 187 to 189.)

The contentions made here were each and all specified in the application for rehearing including the contention that the cause was removable regardless of its ancillary form; that jurisdiction of the state court was divested by the filing of the petition and bond; that the remand had no retroactive effect if the cause was in fact removable; that a disclosure was filed in the only court having jurisdiction at the time, prior to the default, and that the action of the trial court affirmed by the Supreme Court of Michigan denied petitioner its day in court and thereby deprived it of property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States (R., pp. 190 to 201). The following is an excerpt from the application for rehearing:

“The questions as to the effect of the removal proceeding and the steps taken therein, involve wholly the construction of the Federal statutes pertaining thereto, and we submit that such Federal questions have been incorrectly decided by the trial court and by this court. We further submit that the judgment in this cause was affirmed by this court, has erroneously denied appellant its day in court, and thereby taken its property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States. In effect appellant has been denied an opportunity to be heard on the merits because it asserted in good faith that a right to remove the cause existed and took appropriate steps to attempt to establish its contention. If the cause was removable, appellant at all times took the only steps available in the only court where at the time they could be taken, and at the time it was defaulted had taken all steps, in a court which then had jurisdiction, necessary to have prevented a default, if taken in the state court.”

The application for rehearing was seasonably filed, entertained and denied by the Supreme Court of Michigan on June 18, 1940 (R., p. 202).

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Supreme Court of the State of Michigan, commanding that court to certify to this Court for its review and determination, on a day certain to be therein named, all proceedings in the case numbered and entitled on its docket No. 40692, Frank Stevens; plaintiff and appellee, v. R. A. Northway, doing business under the assumed name of Northway Clinic and Hospital, R. A. Northway, Roy B. Fisher, principal defendants, The Metropolitan Casualty Insurance Company of New York, a foreign corporation, garnishee defendant and appellant, and that the judgment of the Supreme Court of the State of Michigan and of the Isabella Circuit Court of the State of Michigan, be reversed by this Honorable Court and that your petitioner may have such other and further relief in the premises as to this Honorable Court may be meet and just, and your petitioner will ever pray.

THE METROPOLITAN CASUALTY INSURANCE
COMPANY OF NEW YORK,

By FREDERICK J. WARD,
H. MONROE STANTON,
ALAN W. BOYD,
Attorneys for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

The opinion of the Supreme Court of the State of Michigan appears in the Record at pages 187 to 189. It is reported in 291 N. W. 211 and set out in full in the petition herein (pp. 5 to 7).

II

Jurisdiction

The date of the judgment of the Supreme Court of the State of Michigan was April 1, 1940 (R., p. 187). A petition for rehearing was seasonably filed and was denied June 18, 1940 (R., p. 202). The decision affirms the judgment of the trial court.

III

Statement of the Case.

All essentials necessary to a consideration of this petition are set out in the petition under the "Summary Statement" (Petition, p. 2).

IV

Assignments of Error

The assignments of error are set forth in the petition under the heading of "Reasons Relied On for Allowance of the Writ" (Petition, pp. 3 to 5).

Summary of Argument

The controversy between petitioner and respondent while in form an action of garnishment was in substance a new and independent controversy and as such removable to the Federal Court.

The cause was effectively removed and the State Court lost jurisdiction prior to the time petitioner was required to appear and answer in the State Court and was without jurisdiction at the time petitioner was defaulted. Such action was therefore void.

Jurisdiction was regained by the State Court by the remand but was not restored retroactively and the prior default was not rendered valid thereby. At the time of the remand petitioner had appeared in the court then having jurisdiction of the cause and filed its disclosure. Such action could not be treated by the State Court as a nullity even though the order of remand is final as to further proceedings in the Federal Court.

The policy of Congress in denying review of an order of remand is to avoid delay in the progress of the cause. Such purpose does not require that the interim proceedings be considered a nullity where the cause was in fact removable and where the result would be to penalize the assertion of a federal right.

ARGUMENT

I

The questions presented by petitioner depend initially on whether this cause was properly removable to the United States District Court and whether the proceedings in that court prior to remand have any force and effect. If it was not so removable the situation is merely one where the petitioner failed to take proper steps at the time required under the practice of the State of Michigan and was defaulted by reason of such failure. If, on the other hand, the cause was one which petitioner was entitled to remove and proper steps were taken to that end, it has been penalized by the State Court because it availed itself of a federal right given by the statutes of the United States pertaining to removal. Clearly all elements of removability were present unless removal was prevented by the fact that the proceeding was in garnishment and consequently ancillary in form.

While it is true that the action was in form ancillary, it is independent and original as far as petitioner and respondent were concerned. The question whether petitioner was bound to pay the judgment under its policy was not involved in the original action, and its essential nature was in no way altered because respondent elected to proceed under the garnishment statute instead of by an original action on the policy which he had the right to maintain. We have found no decision of this court decisive of this question and there has been a considerable divergency of view of the lower federal courts. The better-considered cases, however, uphold removability. The question was thoroughly considered in *Reed v. Bloom* (Maryland Casualty Company of Baltimore, Garnishee) (D. C., W. D. Okla. May 1, 1936), 15 F. Supp. 7, 8, from which we quote as follows:

"The plaintiff, Tom B. Reed, recovered a judgment against the defendant, Lloyd L. Bloom, in the District Court of Oklahoma County, Okla., on the 7th day of February, 1936, for injuries received in an automobile accident. After the rendition of said judgment, execution was issued against the defendant, Bloom; the execution being returned: 'No property found.' Thereafter garnishment proceedings were instituted against the garnishee, Maryland Casualty Company, a nonresident corporation, in aid of the execution, under Sections 500 and 501, O. S. 1931.

The garnishee answered said process, and within due time filed its petition to remove to this court. The plaintiff filed his motion to remand, and this matter comes on for hearing on the motion to remand.

It is the contention of the plaintiff that this action is so directly connected with the original suit as to be a part of the original suit, and that this proceeding is merely an action in aid of execution. The garnishee contends that the controversy between the plaintiff and the garnishee is in the nature of an independent action and is the same as a suit at law by the plaintiff against this garnishee.

There is no question in the court's mind but that the plaintiff has followed the procedure as provided in the Oklahoma statutes. *The question, however, to be determined is whether or not regardless of the name of the proceeding, the action is independent and is an original action insofar as this garnishee is concerned.*

It is admitted that the garnishee executed an indemnity policy in favor of the defendant in the original action, but its contention is that this policy does not cover the class of accidents in which the plaintiff was injured; that this question was not

involved in the original suit, but constitutes an independent suit. * * *

It is admitted that, had the plaintiff brought an original action against the garnishee on the insurance policy, such action would have been removable from the State Court to Federal Court. Clearly the only advantage that the plaintiff secured by virtue of his judgment against Bloom in the State Court, insofar as the garnishee in this action is concerned, was the right to be substituted for Bloom as the beneficiary under the indemnity policy. *The right to remove a cause to the Federal Court is controlled wholly by federal statutes*; it being admitted that a state cannot enact a law which would affect the rights of a nonresident under the Constitution and the laws of the United States.

In *Terral v. Burke Construction Company*, 257 U. S. 529, 48 S. Ct. 188, 189, 66 L. Ed. 352, 21 A. L. R. 186, the court, in discussing the right of a nonresident citizen to remove a cause to the federal court under the terms of the federal statute, said: 'It rests on the ground that the federal constitution confers upon citizens of one state the right to resort to federal courts in another, that state action, whether legislative or executive, necessarily calculated to curtail the free exercise of the right thus secured is void because the sovereign power of a state in excluding foreign corporations, as in the exercise of all others of its sovereign powers, is subject to the limitations of the supreme fundamental law.'

In *Donald v. Philadelphia & Reading Coal Company*, 241 U. S. 329, 36 S. Ct. 563, 564, 60 L. Ed. 1027, quoting from *Harrison v. St. Louis & San Francisco R. Company*, 232 U. S. 318, 34 S. Ct. 333, 58 L. Ed. 621, L. R. A. 1915 F., 1187, the court said: 'The judicial power of the United States as created the Constitution and provided for by Congress pur-

suant to its constitutional authority is a power wholly independent of state action, and which therefore the several states may not, by any exertion of authority in any form, directly or indirectly, destroy, abridge, limit, or render inefficacious.'

In defining a 'suit,' in *Weston v. City Council of Charleston*, 2 Pet. 449, 464, 7 L. Ed. 481, Chief Justice Marshall said: 'The term is certainly a very comprehensive one, and is understood to apply to any proceeding in a court of justice, by which an individual pursues that remedy in a court of justice which the law affords him. The modes of proceeding may be various, but if a right is litigated between parties in a court of justice, the proceeding by which the decision of the court is sought is a suit. The question between the parties is precisely the same as it would have been in a writ of replevin, or in an action of trespass.'

In *Pacific Railroad Removal Cases*, 115 U. S. 1, 18, 5 S. Ct. 1113, 1124, 29 L. Ed. 319, the court, in considering certain issues which arose between a nonresident corporation in connection with other interested parties in an action pending in a state court said: 'The proceedings for widening the street, pending in the state court, may have to await the decision of the case in the federal court; and the result of those proceedings may be materially affected by the decision of that case; but that consideration does not affect the separate and distinct character of the controversy between the city and the railway company, although it might raise a question of proper parties in a pure chancery proceeding as between the city and the company. This controversy is, to all intents and purposes "a suit." The indirect effect upon the general proceedings for widening the street which would ensue in case the Federal Court should determine that the city of Kansas had no right to widen the street in the company's depot grounds, or that the valuation of its

property was much too small, or the assessment of benefits against it was much too large, furnishes no good reason for depriving the company of its right to remove its suit into a United States court. We think that the case was removable to that court under the act of March 3, 1875.'

In a much more recent case, *Commissioners of Road Imp. District v. St. Louis Southwestern R. Company*, 257 U. S. 547, 42 S. Ct. 250, 255, 66 L. Ed. 364, the court, in response to the contention that the proceeding could not be removed because the statutory proceedings could not have been originally instituted in the Federal Court, said: 'This limitation is not intended to exclude from the right of removal defendants in cases in the Stat. Court which, because of their peculiar form would be awkward as an original suit in a federal court, or would require therein a reframing of the complaint and different procedure. *Sheffield Furnace Company v. Witherow*, 149 U. S. 574, 579, 13 S. Ct. 936, 37 L. Ed. 853; *Fleitas v. Richardson*, No. 1, 147 U. S. 538, 544, 13 S. Ct. 429, 37 L. Ed. 272. The limitation is that only those proceedings can be removed which have the same essentials as original suits permissible in district courts; that is that they can be readily assimilated to suits at common law or equity, and that there must be diverse citizenship of the parties and the requisite pecuniary amount involved.'

In *Smith v. Adams*, 130 U. S. 167, 9 S. Ct. 566, 568, 32 L. Ed. 895, the court said: 'Whenever the claim or contention of a party takes such a form that the judicial power is capable of acting upon it, then it has become a case of controversy.'

In *Schuler v. Israel*, 120 U. S. 506, 7 S. Ct. 648, 650, 30 L. Ed. 707, it is said: 'As we understand the law concerning the condition of a garnishee in attachment, he has the same rights in defending

himself against that process at the time of its service upon him that he would have had against the debtor in the suit for whose property he is called upon to account.'

In *McLaughlin v. Swann*, 18 How. 217, 229, 15 L. Ed. 357, the court said: 'But in a state where the legal and equitable jurisdictions are distinct, and in a court of the United States, having full equity powers, we consider that a garnishee should stand as nearly as possible in the same position he would have occupied if sued at law by his creditor.'

* * *

In *Davis v. Lilly*, 17 Okla. 579, 87 P. 302, 303, the Oklahoma Supreme Court, in discussing a suit in which the garnishee was made a party in the original action, said: 'In an action of this kind two distinct and different issues are presented. One between the plaintiff and defendant, and the other between the plaintiff and the garnishee.'

In *Tunstall v. Worthington*, Federal Case No. 14,239, in discussing the character of a garnishment proceeding, it was said: 'It is in every respect a suit in which the primary object is to obtain judgment against the garnishee, and certainly cannot with any plausibility be treated as process of execution, or as part of the execution process.'

In *Ward v. Congress Construction Company* (C. C. A., 7th Circuit), 99 F. 598, 602, in a suit in equity in a state court enjoining the erection of buildings on certain grounds, a motion was filed by the complainant for an order restraining a third person, who was not a party to the suit, from violating the decree. The third party, being a non-resident of the state, filed a petition and bond for removal of the case to the Federal Court. It was contended that the proceeding was ancillary to the original action and was not an independent suit which could be removed. The court said: 'But a

party thus brought in, who was in no way bound by the original decree, it is evident, must be deemed to have the same right to ask a removal as if he had been made a party at first; and, indeed, a better right, since there can arise no questions of the separability of his interests from those of the original defendants.'

The court in its opinion further said: 'While the proceeding now in question evidently was intended to be auxiliary to the decree of the State Court, and was so in form, yet in fact, *ratione materiae*, it was not of that character.'

The plaintiff in this action relies largely upon an opinion by Judge Kennamer of the Northern District of Oklahoma, *Lahman v. Supernew et al.* (Indemnity Ins. Company of North America, Garnishee) (D. C.), 47 F. (2d) 610, decided February 10, 1931, in which Judge Kennamer held that a garnishment proceeding, such as has been instituted by the plaintiff, was not an independent action, but was a proceeding in aid of execution. Much as I respect the judgment of my learned friend Judge Kennamer, I cannot agree with his conclusions in that case. He also cites a case from the Eastern District of Missouri by District Judge Davis, *Brucker v. Georgia Casualty Company* (D. C.), 14 F. (2d) 688. I have read this opinion very carefully and, while there is a difference between the Oklahoma statutes and the Missouri statutes, I cannot follow the conclusions reached in that case.

The mere fact that the plaintiff in this case preferred to bring a garnishment proceeding against the garnishee in this case, instead of filing an independent suit against the garnishee does not change the position of the garnishee as to its rights to remove the cause to the Federal Court.' * * *

This court is not inclined to increase the business of the Federal Court in this district, but an

emergency arising from an over-crowded docket is not sufficient to justify a denial of the constitutional right of the garnishee. The motion to remand will be overruled and an exception allowed."

The following decisions of the judge of the Northern District of Oklahoma are in conflict with this view:

Lahman v. Supernaw et al. (D. C. N. D. Okla., 1931), 47 F. (2d) 610;

Lawley v. Whiteis, 24 F. Supp. 698.

The question is set at rest in the Tenth Circuit however, in *London & Lancashire Indemnity Co. v. Courtney* (C. C. A. 10, July 31, 1939), 106 F. (2d) 277, 283, where it was said:

"With diversity of citizenship and other jurisdictional facts existing, the right of the defendant to remove such suits into the Federal Court exists. See *Barrow v. Hunton*, 99 U. S. 80, 85, 25 L. Ed. 407; *Gaines v. Fuentes*, 92 U. S. 10, 2 Otto 10, 23 L. Ed. 524; *Bondurant v. Watson*, 103 U. S. 278, 281, 26 L. Ed. 447; *Lackawanna Coal & Iron Co. v. Bates*, C. C., 56 F. 737 (opinion by late District Judge John F. Phillips); *Reed v. Bloom*, D. C., 15 F. Supp. 7; *Old Dominion Oil Co. v. Superior Oil Corp.*, D. C., 283 F. 636; *Chicago M. & St. P. R. Co. v. Spencer*, D. C., 283 F. 824; *Pacific Railroad Removal Cases*, 115 U. S. 1, 5 S. Ct. 1113, 29 L. Ed. 319; *Commissioners of Road Imp. Dist. v. St. Louis, Southwestern R. Co.*, 257 U. S. 547, 42 S. Ct. 250, 66 L. Ed. 364; *Mississippi & R. River Boom Co. v. Patterson*, 98 U. S. 403, 25 L. Ed. 206; *Madisonville Traction Co. v. St. Bernard Mining Co.*, 196 U. S. 239, 25 S. Ct. 251, 49 L. Ed. 462; *Parker v. Overman*, 18 How. 137, 15 L. Ed. 318; *Searl v. School Dist.*, 124 U. S. 197, 8 S. Ct. 460, 31 L. Ed. 415; *In re Stutsman County*, C. C., 88 F. 337; Colo-

rado Midland R. Co. v. Jones, C. C., 29 F. 193, and cases cited *In re Palmer's Will*, D. C., 11 F. Supp. 301. * * *

In the instant case the defendant garnishee's controversy with the plaintiff, Lucille A. Courtney, is wholly separable from the issues involved on which the judgment against R. G. Courtney in favor of Lucile A. Courtney is founded. The only question to be litigated in the civil action wherein the garnishee, London & Lancashire Indemnity Company of America, is defendant and Lucile A. Courtney, plaintiff, is as to whether said garnishee was indebted to said defendant, R. G. Courtney.

The affidavit for writ of garnishment takes the place of a petition. The defendant garnishee is brought into court on process, and his answer as garnishee constitutes his answer in that action. The object of the proceedings is to have the court adjudge whether the defendant's property shall be rendered liable to plaintiff in the amount of the judgment. On this issue he would be entitled to a trial in due form of law with right of appeal and review on writ of certiorari."

Toney v. Maryland Casualty Co. et al. (D. C. W. D. Va.), 29 F. Supp. 785, also denies the right of removal and cites in support of the ruling, *American Automobile Ins. Co. v. Freundt* (C. C. A. 7, 1939), 103 F. (2d) 613. The question involved there was whether an insurer who was a defendant in a garnishment proceeding pending in a state could maintain an action in the Federal Court for a declaration of rights as to the issues involved in the State Court proceeding. It was held that the Federal Court had the discretionary right to refuse to entertain the action and suggested as one reason for the holding, the nonremovability of an ancillary action. None of the foregoing de-

cisions are cited and the question involved here clearly was not considered with any degree of thoroughness. We submit that the authorities holding the cause removable where it involves an essentially independent controversy are sound and reach a correct result.

The Michigan statute under which this proceeding was commenced is set out in the appendix hereto. It provides that the affidavit for the writ shall be held and considered as a declaration by the plaintiff against the garnishee defendant and sets out the method affirming the issues for the trial of the question of the garnishee's liability. The right to a trial by jury if requested is specifically included. In substance this cause was an independent controversy and removable as such.

II

The filing of a proper petition for removal and bond after notice and within the proper time, divests a state court of jurisdiction to proceed further regardless of whether any order is made by the State Court. The rule has been recently stated as follows in *Morgan v. Kroger Grocery and Baking Company* (C. C. A. 8), 96 Fed. (2d) 470, 472:

"Ordinarily, the filing of a proper petition and bond for removal deprives the State Court of jurisdiction and confers jurisdiction upon the Federal Court. *Kingston v. American Car & Foundry Company*, 8 Cir., 55 F. (2d) 132; *Janoske v. Porter*, 7 Cir., 64 F. (2d) 958. The fact that the State Court declined to sign the order of removal, or the fact that it signed an order denying the petition for removal, would not affect the jurisdiction of the Federal Court if, in fact, the cause were removable."

While jurisdiction in the State Court may be regained as a result of remand, the jurisdiction in the meantime, if as we contend the cause was in fact removable, would necessarily be in the Federal Court alone. It necessarily follows that any action in the State Court during the interim, would be of no force and effect. Many authorities are cited in 54 Corpus Juris 343, to the following statement:

“Where a right to remove a cause from a State Court to a Federal Court exists, and a removal is properly effectuated, the State Court is thereby divested of jurisdiction; and it has no power to proceed further, save to enter an order of removal, *unless and until the cause is thereafter remanded by the Federal Court. Pending any such remand, therefore, or if the cause is not remanded, any further proceedings had or orders made there by such State Court are not merely erroneous, but coram non judice and absolutely void.*”

In *Bishop & Babcock Sales Company of Ohio v. Lackman* (Tex. C. A.), 4 S. W. (2d) 109, it was held that where a cause has been removed to the Federal Court even though thereafter remanded, the State Court has no jurisdiction in the meantime, and that the time when defendant would otherwise be required to answer is extended until after the remand. The court said:

“After the suit was removed to the Federal Court and during its pendency in that court, the State Court had no jurisdiction of it and the defendant was not required to file an answer in that court even to the merits of the case. The citation issued in the State Court required the defendant to appear at the October term, and since the case was not in that court during that term, necessarily the defendant was not required to answer *until after*

the remand of the case to that court. After the case was remanded the first appearance term of the State Court was the May term, and prior to the beginning of that term the plea of privilege was filed. It would be unreasonable to hold that an answer to the merits and a cross-action filed by the defendant in the Federal Court would be a waiver of the right to file a plea of privilege in the State Court later."

It follows that if the cause was removable, the default entered on April 11th, 1939, at a time when the cause was still pending in the District Court, was wholly void and could not constitute a basis for a later judgment rendered thereon. While there is little authority dealing with the question of whether a remand restores jurisdiction retroactively, there is at least some substantial authority that it does not. In *Roberts v. C., St. P., M. & O. Ry. Company*, (Minn.), 51 N. W. 478, a petition for removal to the Federal Court was filed in the clerk's office but not presented to the court. A certified copy of the record was then obtained and filed in the Federal Court, but this was not called to the attention of the judge. The defendant was defaulted and later attempted to have the default set aside. In the meantime the Federal Court remanded the cause. While the court refused to set aside the default for the reason that it considered the mere filing with the clerk insufficient to remove the cause, it plainly recognized that had the petition been properly presented, the remand would have no retroactive effect in bolstering the court's want of jurisdiction in the interim. The court there said:

"Nor can it affect the validity of the judgment that the case was subsequently remanded to the State Court, it being considered by the Circuit Court that the attempted removal had not been effectual. Of course, that decision of the Circuit Court is to be regarded as authority upon the question whether

the proceedings for removal were effectual; *but the remanding of the cause had no retroactive effect as respects the jurisdiction of the State Court prior thereto.*"

III

If in fact the cause was a removable one, the State Court lost jurisdiction prior to March 31, 1939, and the appellant on April 10, 1939, filed in a court then having exclusive jurisdiction of the parties and subject matter, its appearance and disclosure. The State Court had not regained jurisdiction by remand at that time. The Federal Court had not yet relinquished it by remand. At the time the State Court regained jurisdiction, and immediately proceeded to enter a default judgment, the disclosure had been actually filed in a court having at the time, exclusive jurisdiction, being in fact the only court where any valid step could then be taken. The order of remand does not specify want of jurisdiction as a ground (R., p. 21). Undoubtedly the remand even though erroneous terminated any right to litigate the matter further in the Federal Court although it has been held that such an order can be reviewed if not based on jurisdictional grounds. *Bankers Securities Corp. v. Insurance Equities Corp.* (C. C. A. 3, 1936), 85 F. (2d) 856. The policy of Congress in denying a review of an order remanding a cause has been many times declared to be grounded on the delay which would ensue if an appeal from the order had to be disposed of before the cause could proceed further. *Ex parte Bopst* (C. C. A. 4, 1938), 95 F. (2d) 828. This purpose could be in no way defeated by recognizing in subsequent litigation the validity of proceedings in the Federal Court prior to remand where the cause as here is obviously removable, so that a litigant would not be penalized by denial of an opportunity to present his

cause on the merits, for asserting a right given by Federal statute. Any other result deprives him of his property without due process of law.

It is submitted that the petition presents a subject matter which should be determined by a decision of this court.

Respectfully submitted,

FREDERICK J. WARD,
H. MONROE STANTON,
ALAN W. BOYD,

Attorneys for Petitioner.

APPENDIX

AFFIDAVIT AS DECLARATION AGAINST GARNISHEE; ADMISSION; FRAMING OF ISSUE; JUDGMENT; DEMAND FOR TRIAL. Sec. 11. The affidavit for the writ of garnishment shall be held and considered as a declaration by the plaintiff against the garnishee as defendant; and upon the filing of the garnishee disclosure, or upon filings of the answers to such written interrogatories, in cases where the same are required and filed, or upon the filing of the report of the testimony or statement made by such garnishee on such personal examination in cases where such examination is had, the matter of such affidavit shall be considered as denied except so far as the same is admitted by such disclosure, answers to interrogatories or report, which admission shall have the effect of admissions in a plea, and also shall be prima facie evidence of the matters therein admitted. And thereupon a statutory issue shall be deemed framed for the trial of the question of the garnishee's liability to the plaintiff. And judgment may be rendered against such garnishee defendant, as upon declaration and plea, or on plaintiff's motion to the court at any time after final judgment against the defendant in the principal cause, without further notice to such garnishee: PROVIDED HOWEVER, If such plaintiff or such garnishee defendant shall within ten (10) days after filing of such disclosure, answer or statement, file with the clerk of such court a demand for trial of the cause, said cause shall stand for trial in the manner provided by this act. A jury may be had on demand of either party. The time for filing said demand may be extended by the court upon application and showing.

Michigan C. L. 1929, Sec. 14867, Mich. Stat. Ann.,
Section 27.1865.

BLANK PAGE

BLANK PAGE

BLANK PAGE

SUBJECT INDEX

	Page
Answer To Petition:	
I. Summary Statement Of The Matter Involved ..	1
II. Reasons Relied Upon For Denial Of The Writ ..	4
Brief:	
I. Opinion Of The Court Below	7
II. Jurisdiction	7
III. Statement Of The Case	7
IV. Summary Of Argument	8
V. Conclusion	20
Argument:	
I. The action of garnishment in Michigan is ancillary to the main suit, not a separable or an independent proceeding. The Plaintiff and Principal Defendants, all being residents of Michigan, such garnishment action was therefore not a removable cause	9
II. Federal Courts respect the decisions of State Courts interpreting their own statutes and are bound thereby. On attempted removal of this case, the United States District Court decided that this garnishment action was not an independent suit, was not a separable controversy, that there was not complete diversity of citizenship, and that it therefore had no jurisdiction. It therefore remanded same. Such Order of Remand cannot be reviewed by the State or Federal Courts and is final and unappealable	10
III. By the Order of Remand the Federal District Court determined that it never had jurisdiction, and any disclosure filed therein was therefore a nullity. The State Court, therefore, never lost jurisdiction and the first default taken was valid. Even if the first default should be disregarded, a second default was	

	Page
taken after the Order of Remand was made and filed in the State Court, which latter default supports the judgment entered	14
IV. The claimed Federal questions now raised by the Petitioner for the first time, never having been raised before, will not and cannot be considered on appeal	16
V. The Petition herein delays the proceedings of the judgment of the lower Court and appears to be sued out merely for delay	18

Amended Record:

I. Answer To The Motion For Rehearing	22
II. Motion To Remand	75

ALPHABETICAL TABLE OF CASES AND STATUTES CITED

Cases

American Automobile Ins. Co. v. Freundt (C. C. A. 7), 103 Fed. (2d) 613	11
American Surety Co., Plff. in certiorari v. Vivian F. Baldwin, et al, Vivian F. Baldwin, et al, v. American Surety Co., 287 U. S. 156, 77 L. Ed. 231, 53 S. Ct. 98, November 14, 1932	16
Brucker vs. Georgia Casualty Co., 14 F. (2d) 688	10
E. A. Pearson vs. Joseph Zacher, Western Surety Co. Garnishee, 177 Minn. 182, 1929	15
Employers Reinsurance Corp. v. Bryant, U. S. District Judge, 229 U. S. 374, 84 L. Ed. 289, 57 S. C. 273 299	51
Erie R. Co. vs. Tompkins, 304 U. S. 64, 82, L. Ed. 1188	12
Federal Housing Administration vs. Ruth Burr, 84 L. Ed. 427 , 60 Sup. Ct. 488	10, 12
John Roberts vs. Chicago, St. Paul, Minneapolis & Omaha Railway Co., 48 Minn. 521	14
Lawley, et al. vs. Whitesis, et al., 24 F. Supp. 698, September 28, 1938	11

	Page
Milwaukee Bridge & Iron Works vs. Henry N. Brevoort, Wayne Circuit Judge, 73 Mich., at Page 157	9
Missouri Pacific R. Co. v. Fitzgerald, 160 U. S. 556 596	13
Toney vs. Maryland Casualty Co. 29 F. Supp. 785, D. C., W. D. Virginia, October 28, 1939	11
Tracy Loan & Trust Co. vs. Mutual Life Ins. Co. of New York, et al., 79 Utah 33, 7 Pac. Rep. (2d) 279	14
Wynyarden vs. LaHuis, 251 Mich. 276	9

Statutes

Sec. 2, Rule 30 of Michigan Supreme Court Rules	18
Sec. 71, Title 28 of United States Code Annotated	8

Text Books

87 A. L. R. 307	17
114 A. L. R. 1477	13
Dobie On Federal Procedure, 402 and 403	10

BLANK PAGE

IN THE
**SUPREME COURT OF THE
 UNITED STATES**

October Term, 1940

FRANK STEVENS,
Respondent,

vs.

No. 425

R. A. NORTHWAY, Doing Business Under
 the Assumed Name of Northway Clinic
 and Hospital, R. A. Northway, Roy B.
 Fisher,

Principal Defendants,

THE METROPOLITAN CASUALTY INSURANCE
 COMPANY OF NEW YORK, a foreign cor-
 poration,

Petitioner.

**ANSWER TO PETITION FOR WRIT OF CERTIORARI
 TO THE SUPREME COURT OF THE STATE OF
 MICHIGAN, WITH SUPPORTING BRIEF**

May it Please the Court:

The Answer of Frank Stevens, the Respondent herein, to the Petition of the Garnishee Defendant herein for a Writ of Certiorari, respectfully presents to this Honorable Court:

I.

**SUMMARY STATEMENT OF THE MATTER
 INVOLVED**

On October 6, 1938, an Isabella County Circuit Court jury rendered a verdict against the Principal Defendants (R., pp. 3, 4) because of permanent injuries sustained from X-Ray burns caused by Defendants in Janu-

ary of 1937. During the trial, which lasted over seven full days, Attorneys Frederick J. Ward and H. Monroe Stanton appeared for and represented the Principal Defendants (R., p. 165). Judgment was entered against the Principal Defendants on November 15, 1938, (R., p. 133) and eventually became final. On March 8, 1939, a Writ of Garnishment was issued (R., p. 6) and was served on Petitioner as Garnishee Defendant on March 10, 1939, (R., p. 8), and required a disclosure to be filed in the Isabella County Circuit Court on or before March 31, 1939. On March 28, 1939, Attorneys Frederick J. Ward and H. Monroe Stanton assumed the anomolous position of now appearing as the attorneys for the Garnishee Defendant, and in such antagonistic position, filed a Petition and Motion in the local Circuit Court to remove said garnishment proceeding to the United States District Court, Eastern District, Northern Division, claiming diversity of citizenship and a separable controversy (R., pp. 10 to 14). On April 4, 1939, the Circuit Court found and held that the Petition did not satisfy the jurisdictional requirements for removal and denied the Motion (R., p. 19). On April 11, 1939, thirty-two days after service of the Writ upon the Garnishee Defendant, the Respondent caused an Order of Default to be entered against Petitioner (R., pp. 24 to 27). On April 15, 1939, and in defiance of the Court's Order of April 4, 1939, Petitioner filed its Notice of Removal in the Federal District Court (R., p. 20) and claimed to have filed a disclosure in the Federal Court on April 10, 1939. On April 15, 1939, a Motion to Remand was made in the Federal District Court (Amended R., p. 75) claiming that said Federal District Court had no jurisdiction of said matter, for the reason that there was no diversity of citizenship and no separable controversy present. At the conclusion of said hearing, the learned Senior District Judge, the Honorable Arthur J. Tuttle, made and entered an Order remanding said cause because of lack of jurisdiction (R., p. 21), which Order was filed in the State Circuit Court on April 17, 1939 (R., p. 21). On April 11, 1939, the attorneys for the Garnishee Defendant were notified by special delivery letter that proofs would be submitted on April 17, 1939, (R., p. 148), and on said

day, after the Order of Remand was filed, and after another Order of Default was entered, proofs were submitted and judgment taken against the Petitioner (R., pp. 27 to 32). On April 18, 1939, the Petitioner, now acting through the same attorneys who formerly represented the Principal Defendants in the main suit, appeared specially and filed a Motion to Set Aside the Default of April 17, 1939. No Motion or attempt was made to set aside the default entered on April 11, nor was any motion or attempt made to vacate the judgment theretofore entered. Garnishee Defendant, in its Motion, made no allegation or claim whatever of any kind that any Federal statute or right had been violated, and no claim that the Fourteenth Amendment had been violated (R., p. 62). On April 27, 1939, the Circuit Court denied Petitioner's Motion (R., p. 99). No disclosure was ever filed by Petitioner in the State Circuit Court.

On May 1, 1939, Petitioner filed its Claim of Appeal (R., p. 104) and its Assignment of Error and Reason and Grounds of Appeal, but said pleadings contained no allegation or claim whatever that any Federal statute or right had been violated and no claim was made that the Fourteenth Amendment had been violated, nor was any such claim made in the argument by Petitioner's attorneys before the Michigan Supreme Court. On April 1, 1940, the State Supreme Court affirmed the Circuit Court (R., pp. 187 to 189) and held that in Michigan the action of garnishment was an ancillary proceeding and that the Default was properly entered and taken because no disclosure had ever been filed in the Circuit Court by the Garnishee Defendant. On April 10, 1940, Petitioner's attorneys advised Respondent's attorneys that they would pay said judgment immediately (Amended R., p. 74). On April 20, 1940, Petitioner filed its Motion for a Rehearing, and for the first time claimed that a Federal question was involved and for the first time claimed that the Fourteenth Amendment had been violated (R., p. 201). On June 18, 1940, the Michigan Supreme Court denied said Motion (R., p. 202).

On June 24, 1940, Petitioner resolved to perfect an Appeal to this Court (R., p. 204), but the Record was

prepared without consulting Respondent's attorneys, and same is incomplete. When Petitioner filed its Motion for Rehearing, same was accompanied by a Supporting Brief (R., pp. 190 to 202) and both the Application or Motion and the Brief were printed by Petitioner in the Record. Respondent filed his Answer to said Motion for Rehearing and same likewise was accompanied by a Supporting Brief. However, Petitioner, while including its own Motion and Brief in the Record, entirely omitted Respondent's Answer and Supporting Brief, and same is therefore appended hereto as a part of the Amended Record. Likewise on page twenty-four of the Petition herein, Petitioner infers that the Order of Remand was not based upon jurisdictional grounds. It therefore is necessary to place before this Court the Motion upon which the Order to Remand was based. Same is therefore appended hereto as a part of the Amended Record.

II.

REASONS RELIED UPON FOR DENIAL OF THE WRIT

Respondent's position briefly summarized is as follows:

The action of garnishment in Michigan, as determined by Statute, Rules of Court and decisions of both the Michigan Supreme Court and the United States Supreme Court, is an ancillary proceeding and inseparably connected with the main suit, and is not an independent suit or proceeding. It is a civil process in the nature of an equitable attachment for the collection of debts. The United States Supreme Court has affirmed the decisions of the Michigan Supreme Court so interpreting the nature of the garnishment process in Michigan. When the Garnishee Defendant presented its Petition and made its Motion to Remove Said Garnishment Action to the Federal District Court, the State Court had the right and duty to pass upon the sufficiency of the Petition for Removal. Because such Petition and Motion showed on their face that a garnishment action was involved, not a separable controversy; therefore not the requisite diversity of

citizenship and no removable cause, the Circuit Court rightfully denied the Motion for Removal.

After the Garnishee Defendant, in defiance of the State Court's Order, certified said cause to the Federal District Court, the Federal Court rightfully remanded said cause because the pleadings on their face showed that a garnishment action was involved and that according to the decisions of the Michigan Supreme Court, which the Federal Court was bound to respect, there was no separable controversy and no diversity of citizenship, and that therefore the Federal District Court had no jurisdiction over the subject matter.

Because the Federal Court could have no jurisdiction of the cause, it never acquired jurisdiction. Since the State Court originally had jurisdiction, the State Court never lost jurisdiction of the cause. Therefore the default of April 11, 1939, was regular and valid, and any pleadings filed in the Federal District Court in the interim between the attempted removal and the actual remand are null and void, or at least subject only to such force or effect as determined by the State Court. There was never any disclosure filed in the State Court as required by Statute and Rule of Court. Disregarding the question of the validity of the default of April 11, the default made and entered in the State Court on April 17, 1939, after the Order of Remand was filed in the State Court, never having been attacked by the Garnishee Defendant, was unquestionably valid and supports the judgment entered thereafter.

The Order of the Federal District Court remanding the cause back to the State Court, was binding upon the State Courts and cannot be reviewed by them. The Federal Code so provides. The Michigan Supreme Court never passed upon the validity of the said Court's Order of Remand, but properly accepted same as binding upon it. The Garnishee Defendant never attempted to file any disclosure in the State Court at any time, though it had thirty-two days in which to file such disclosure before the first default was taken, and thirty-eight days in which to file same before the second default was taken. No Order was ever made by the State Courts denying the

Garnishee the right to file its disclosure in the State Court and thereby protect its rights while it was attempting to remove said cause to the Federal Court. Nor would the filing of such disclosure affect or prejudice any valid right of removal which it might have had.

The Garnishee Defendant at no time, in the State Court, the Federal District Court or in the Michigan Supreme Court ever claimed that a Federal right had been violated or that its property had been taken without due process. The first time such claim was made was upon the Motion for Rehearing in the State Supreme Court and after Garnishee Defendant previously had agreed to pay said judgment (Amended R., p. 54). Up to that point no Federal question was ever raised by the Garnishee Defendant. The Record speaks for itself. No pleading or Assignment of Error recites any Federal question, and such claimed Federal questions were therefore never passed upon in the State Court of first instance or by the State Appellate Court, or could be. Federal questions thus raised for the first time upon a Motion for Rehearing will not and cannot be considered by this Court.

This appeal is vexatious. After the Michigan Supreme Court affirmed the Lower Court, the Garnishee Defendant agreed to take care of said judgment immediately (Amended R., p. 54). Because of this fact, and because Petitioner seeks to review claimed Federal questions never raised before and because the statutes and decisions are so clear and uniform in holding that such matters cannot be accomplished on appeal, Respondent maintains that this Appeal delays the proceedings on the judgment of the Lower Court and obviously was sued out merely for delay. Respondent therefore contends that he is entitled to the damages provided for by Section 2 of Rule 30 of the United States Supreme Court Rules.

Wherefore, Respondent respectfully prays that this Honorable Court deny Petitioner's Application for a Writ of Certiorari, and because of the delay caused by Petitioner, that it award to Respondent such additional damages upon the amount of the judgment, as provided

for by the rules of this Honorable Court, as shall be meet and just. And your Petitioner will ever pray.

BRIEF DENYING RIGHT TO PETITION FOR WRIT OF CERTIORARI

I.

The Opinion of the Supreme Court of the State of Michigan appears both in the Record at pages 187 to 189 and in the Petition at pages 5 to 8. An examination of this Opinion reveals that same merely affirms the questions of local or state procedure raised and passed upon by the Lower Court.

II.

JURISDICTION

This Court has no jurisdiction over the matters set forth in the Petition. Rule 38 of the United States Supreme Court Rules, and especially Section 2 thereof, has not been complied with by the Petitioner. Likewise Rule 12, which relates to jurisdiction, has not been satisfied by the Petitioner, for the reason that no Federal questions were raised by the Petitioner in its appeal to the State Supreme Court, nor was there ever a claim made that it had been deprived of its property without due process of law, until for the first time, in the Petitioner's Motion in the State Court for a Rehearing. A claimed federal issue raised at such a late stage of the proceedings comes too late to be considered by this Court.

III.

STATEMENT OF THE CASE

In view of the inaccuracies and omissions in the Petition, Respondent has prepared a Statement correcting such inaccuracies and adding such omitted facts as were necessary. The essential facts necessary have been here-

tofore set forth in the Respondent's Summary Statement (Answer to Petition, p. 1)

IV.

SUMMARY OF ARGUMENT

The controversy between the Petitioner and Respondent is a Garnishment Action which has consistently been determined by the Michigan Courts to be an ancillary proceeding, in the form of an equitable attachment, and therefore inseparable from the main suit or proceeding, and since the Principal Defendants are also residents of Michigan, the action as such could not be removed to the Federal District Court. The State Court properly refused to transfer said cause. The Federal Court was bound by the construction given the Michigan Garnishment Statute, and it respected the decisions of the Michigan Supreme Court interpreting its Garnishment Statute. The Federal District Court definitely determined that it never had jurisdiction of this cause. The State Court therefore always retained jurisdiction. Any pleadings filed in a Court without jurisdiction are a nullity. No Disclosure was ever filed in the State Court, though Petitioner could have filed same without waiving any of its rights. When the Federal District Court remanded said cause, the State Courts merely accepted such decision. The State Courts never passed upon any claim that Petitioner had been deprived of its property without due process of law, or in violation of the Fourteenth Amendment, for the reason that no such Federal questions were ever raised by the Petitioner. The Order of Remand was final and unappealable, and cannot be reviewed or attacked, directly, indirectly or collaterally. If Petitioner's Writ were granted, the effect would be to defeat the very purpose of the policy defined by Congress, as set forth in Section 71 of Title 28 of the United States Code Annotated, that an Order of "Remand shall be immediately carried into execution, and no appeal or Writ of Error from the decision of the District Court so remanding such cause shall be allowed."

ARGUMENT

I.

The action of garnishment in Michigan is ancillary to the main suit, not a separable or an independent proceeding. The Plaintiff and Principal Defendants, all being residents of Michigan, such garnishment action was therefore not a removable cause.

The Michigan Supreme Court, in interpreting the statute governing garnishment in Circuit Court after judgment, has uniformly held, without exception and from an early date, that such garnishment action is an ancillary, not an independent action.

"Section 8145. How. Stat., provides how suits may be commenced in the Circuit Courts of this State against foreign corporations. The Writ of Garnishment and proceedings thereon are always ancillary, and the service of such Writ is not the commencement of an action." *The Milwaukee Bridge & Iron Works v. Henry N. Brevoort*, Wayne Circuit Judge, 73 Mich., at Page 157.

"The situation must depend upon the principal suit commenced. Garnishment is ancillary and not the commencement of an action." *Wynyarden v. La-Huis*, 251 Mich. 276.

The Michigan Supreme Court merely affirmed this long established rule of law in its opinion in this case (R., p. 187) when it said:

"The garnishment proceeding is ancillary to the action against the principal Defendants and wholly dependent thereon and not the commencement of an independent action."

In a very recent case, the United States Supreme Court likewise affirmed the foregoing rule of law and accepted the construction placed by the Michigan Courts upon the Michigan Garnishment Statute, when it held that in Michigan a Writ of Garnishment is a civil process of law, in

the nature of an equitable attachment. See *Federal Housing Administration v. Ruth Burr*, 84 L. Ed. 427, 60 Sup. Ct. 488. We quote from the opinion:

"Garnishment and attachment commonly are part and parcel of the process, provided by statute, for the collection of debts. In Michigan a writ of garnishment is a civil process at law, in the nature of an equitable attachment. See *Posselius v. First Nat. Bank*, 264 Mich. 687, 251 N. W. 429, 90 A. L. R. 342."

Also see *Dobie On Federal Procedure*, Pages 402 and 403.

II.

Federal Courts respect the decisions of State Courts interpreting their own Statutes and are bound thereby. On attempted removal of this case, the United States District Court decided that this garnishment action was not an independent suit, was not a separable controversy, that there was not complete diversity of citizenship, and that it therefore had no jurisdiction. It therefore remanded same. Such order of remand cannot be reviewed by the State or Federal Courts and is final and unappealable.

A. The rule is ably stated in one of the cases which the Federal District Court considered upon the hearing in this case on the Motion to Remand:

"A garnishment proceeding, provided by the statutes of Missouri, as construed by the Courts of the State, is not an independent suit, but is supplemental to the main action and provides one of the means of securing a satisfaction of the Judgment. This is the interpretation that the Courts of Missouri have placed upon the statute. — All of the Missouri cases seem to be to the same effect. *The construction thus given the statute is not to be ignored in this Court.*" *Brucker v. Georgia Casualty Company*, 14 F. (2d) 688.

In *Lawley et al. v. Whitesis et al.* (24 F. Supp. 698, September 28, 1938), the Federal Court held:

"The Supreme Court of Oklahoma has determined that garnishment after judgment is practically an equitable execution brought for the purpose of reaching nonleviable assets and is a means provided for obtaining satisfaction of a judgment of a creditor out of the property of the debtor. See *First National Bank of Cordell v. City Guaranty Bank of Hobart*, 174 Okl. 545, 51 P. 2d 573; *Davidson v. Finley*, 96 Okl. 291, 222 P. 678. It is thus well established that the proceedings in garnishment after judgment, is auxiliary to the main case and is only a means provided for obtaining satisfaction of a judgment. It has been construed by the Supreme Court of Oklahoma to partake of an equitable execution. The construction of the Statutes of Oklahoma governing garnishment proceedings after judgment, is binding upon this court. *Erie R. Co. v. Tompkins*, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A. L. R. 1487; *Ruhlin v. New York Life Insurance Company*, 304 U. S. 202, 58 S. Ct. 860, 82 L. Ed. 1290.

"Since the rendition of the decisions in *Erie R. Co. v. Tompkins*, *supra*, and *Ruhlin v. New York Life Insurance Co.*, *supra*, this court is bound by the construction placed upon garnishment proceedings similar to those involved here, by the Oklahoma Supreme Court, rather than expressions from other Federal Courts with respect to garnishment generally."

In the very recent case of *American Automobile Insurance Company v. Freundt, et al* (103 F. (2d) 613, C. C. A., 7th Circuit, April 27, 1939) the Circuit Court of Appeals held that it was bound by the decisions of the Illinois Supreme Court holding that garnishment was merely an ancillary proceeding and that therefore the issue in the garnishment action as between the Plaintiff and the Insurer could only be settled in the State Court.

Also see *Toney v. Maryland Casualty Company* (29 F.

Supp. 785, D. C., W. D. Virginia, October 28, 1939) wherein the Court held:

"The sole question in the case is whether this garnishment under the applicable Virginia statute is an ancillary proceeding.

* * *

"(5) It is not necessary for me, in sustaining the Motion to Remand, to express concurrence in these opinions holding that garnishment proceedings are (even under the statutes of the states in question) in their essential nature independent actions. Nor need I hold that an unusual and extreme statute cannot make garnishments really independent actions rather than ancillary proceedings. All that I need decide here, and all that I do decide, is that under the Virginia Statutes garnishments are mere ancillary proceedings which are not removable from a state to a federal court."

Also see *Federal Housing Administration v. Ruth Burr* (84 L. Ed. 427, 60 Sup. Ct. 488) in which this court only recently decided that "Whether by Michigan law execution under such a judgment may be had is, like the availability of garnishment, *Federal Land Bank v. Priddy*, supra, (295 U. S. 229, 79 L. Ed. 1408, 55 S. Ct. 705) a state question."

This court very recently affirmed this rule in *Erie R. Co. v. Tompkins*, 304 U. S. 64, 82, L. Ed. 1188.

B. Even though Petitioner, on page 24 of its Petition, infers that the garnishment action was not remanded because of lack of jurisdiction, nevertheless a cursory examination of the Motion to Remand (Amended R., p. 75) very clearly shows that the sum and substance of the entire Motion to Remand was that the Federal District Court had no jurisdiction over the garnishment action or the parties. Such Order of Remand is binding upon the State Courts and cannot be reviewed by them, and likewise such order cannot be attacked directly, indirectly or collaterally, because it was final and unappealable.

See Section 71 of Title 28 of the United States Code Annotated, together with annotations thereunder.

See 114 A. L. R., 1477, wherein the following rule is set forth:

"Specifically referring to the Federal statute whereby it is provided that the order of the inferior Federal Court remanding the cause to the State Court shall be immediately carried into execution, and that no appeal or writ of error from the decision shall be allowed, *State Courts have held uniformly*, albeit in varying phraseology, *that the Order of Remand is not reviewable in the State Courts.*"

This rule was definitely settled in *Missouri Pacific R. Co. v. Fitzgerald*, 160 U. S. 556, wherein the court stated:

"If the Circuit Court remands a cause, and the State Court thereupon proceeds to final judgment, the action of the Circuit Court is not reviewable on writ of error to such judgment."

C. In a very recent case decided on January 4, 1937, this court, speaking through the Honorable Justice Van Devanter, definitely determined the finality of an Order of Remand;

"We are of opinion the petition was rightly denied, first, because the remanding order was not subject to appellate re-examination on petition for mandamus or otherwise, * * * the use of the words 'such remand shall be immediately carried into execution,' in addition to the prohibition of appeal and writ of error, is strongly indicative of an intent to suppress further prolongation of the controversy by whatever process. We are, therefore, of opinion that the act has the effect of taking away the remedy by mandamus as well as that of appeal and writ of error."

Petitioner, on page 24 of its Brief, infers that the Order of Remand was not based on want of jurisdiction. This is conclusively refuted by reference to the Motion to Remand (Amended R., p. 75) in which the Principal Defendants "appear specially * * * expressly denying that this court has jurisdiction of this cause or these Defendants." A reference to this pleading discloses the

Employers Reinsurance Corp. v. Bryant, U. S. District Judge,
299 U. S. 374, 81 L. Ed. 289, 57 S. C. 273,

reasons given for the foregoing contention that the Federal Court had no jurisdiction over the subject matter or the parties.

III.

By the order of remand the Federal District Court determined that it never had jurisdiction, and any disclosure filed therein was therefore a nullity. The State Court, therefore, never lost jurisdiction and the first default taken was valid. Even if the first default should be disregarded, still a second default was taken after the order of remand was made and filed in the State Court, which latter default supports the judgment entered.

In *Tracy Loan & Trust Co. v. Mutual Life Insurance Co. of New York, et al.* (79 Utah 33, 7 Pac. Rep. (2d) 279) the court said:

"(3) It is well settled that it is for the state Court to determine what effect, if any, shall be given pleadings filed or orders made in Federal courts while the cause was pending there before remand. 54 C. J. 376; *Ayres v. Wiswall*, 112 U. S. 187, 5 S. Ct. 90, 28 L. Ed. 693; *Cates v. Allen*, 149 U. S. 451, 13 S. Ct. 883, 37 L. Ed. 804; *Broadway Insurance Co. v. Chicago G. W. R. Co.* (C. C.) 101 F. 507.

* * *

"(4) This rule is well supported by cases which hold that, where remand is based on want of jurisdiction on the part of the Federal Court, any findings or orders made by such court during the time the case was there are void and are not binding upon the State Court nor upon the parties. *Graves v. Corbin*, 132 U. S. 571, 10 S. Ct. 196, 33 L. Ed. 462; *Ayres v. Wiswall*, supra."

In *John Roberts v. Chicago, St. Paul, Minneapolis & Omaha Railway Co.* (48 Minn. 521) the Minnesota Supreme Court held that the judgment entered against the Garnishee Defendant between an attempted removal and the Order of Remand, was a valid judgment. The *Roberts*

case was eventually appealed to the United States Supreme Court and on December 7, 1896, as reported in 164 U. S. 703, application for a writ of certiorari was denied, and by such denial, the *United States Supreme Court affirmed* the holding of the lower District Court *that the judgment, or act of the State Court made in the interval, was valid.*

This rule was followed in *E. A. Pearson v. Joseph Zacher, Western Surety Company, Garnishee*, (177 Minn. 182, 1929) wherein the court held:

"It is sufficient for us to hold, as we do, that on such removal of a cause, if it afterward appears that the suit was not a proper one for removal and is remanded by the Federal Court, any act of the State Court made in the interval is valid. *Yankaus v. Feltenstein*, 244 U. S. 127, 37 S. Ct. 567, 61 L. Ed. 1036.

* * *

"But where a motion for removal is made and the Petition is not effective for that purpose, or after removal the Federal Court remands the cause for want of jurisdiction, and in the interim orders are made or judgment entered by the State Court, these are valid notwithstanding they are made after attempted removal. *Youkaus v. Feltenstein, supra*,

* * * The reason or theory underlying these results is that when a case is remanded by the Federal Court for want of jurisdiction, the State Court is regarded as never having lost its jurisdiction, and the Federal Court never acquired jurisdiction. *Finney v. American Bonding Co., supra*; and *Germania Fire Insurance Co. v. Francis*, 52 Miss. 457, 24 Am. Rep. 674; 54 C. J. #45."

In the case at bar, regardless of the validity or non-validity of the first default, because filed after the cause was certified to the Federal Court, nevertheless the Order of Remand made on April 15, 1939, definitely determined that the Federal District Court had no jurisdiction over the cause and that the State Court did have jurisdiction. The default of April 17 taken after the

Order of Remand was filed was thereupon entered at a time when there was no question whatever but that the State Court had jurisdiction over the cause. Such default has been determined to have been a properly entered default, and same therefore supports the judgment herein entered.

IV.

The claimed Federal question now raised by the petitioner for the first time, never having been raised before, will not and cannot be considered on appeal.

A careful reading of the Petition filed herein discloses that on pages 4 and 8, Petitioner makes the claim that it was deprived of its property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States. The claim merely reiterates Petitioner's contention which was made for the first time in its Petition for Rehearing filed in the State Appellate Court. Prior to that time, no claim was ever made at any stage of the proceedings that any Federal right or statute had been violated. The rules are clear that this question was not properly raised at that stage of the proceedings.

Rule 12 of the United States Court Rules especially provides the requirements which must be satisfied before Federal questions can be reviewed by this Court. We submit that Petitioner cannot and does not satisfy the requirements of Rule 12 for the reason that the Record clearly discloses that no claim was ever made by the Petitioner that a Federal statute or a Federal right had been violated, until the Petition for Rehearing was filed in the State Appellate, which was too late.

See *American Surety Company, Plff. in certiorari v. Vivian F. Baldwin, et al, Vivian F. Baldwin et al, v. American Surety Company* (287 U. S. 156, 77 L. Ed. 231, 53 S. Ct. 98, November 14, 1932), which is also reported in 86 A. L. R. 298, in both of which cases the Appellant Surety Company claimed that the judgments were void

under the due process clauses of the Fourteenth Amendment. The court held:

"First. The certiorari granted in No. 3 to review the judgment rendered by the Supreme Court of Idaho on May 2, 1931, must be dismissed for failure to make seasonably the Federal claim. * * * The Baldwins appealed to the Supreme Court of Idaho; and upon the presentation of their appeal no Federal question was raised by either party."

"The Surety Company *petitioned for a re-hearing*. In that Petition, besides reiterating several of its previous contentions, it urged, *for the first time*, that the rendition of the judgment on its undertaking violated the due process clause of the Fourteenth Amendment. The Petition was denied without opinion. The Federal claim there made cannot serve as the basis for review by this Court. The contention that a Federal right had been violated rests on the action of the trial court in entering judgment without giving notice and an opportunity to be heard. The same ground of objection had been raised throughout the proceedings *but solely as a matter of state law*. There had been ample opportunity earlier to present the objection as one arising under the Fourteenth Amendment. (Citations).

* * *

"Second. In No. 21, * * * *since the constitutional issue as to jurisdiction might have been presented to the State Supreme Court and reviewed here*, the decision is a bar to the present suit insofar as it seeks to enjoin the enforcement of the judgment for want of jurisdiction". (Citations).

Also see 87 A. L. R. 307.

V.

The petition herein delays the proceedings of the judgment of the Lower Court and appears to be sued out merely for delay.

Section 2 of Rule 30 of the United States Supreme Court Rules provides that:

"In all cases where an appeal delays proceedings on the judgment of the lower court, and appears to have been sued out merely for delay, damages at a rate not exceeding 10 per cent, in addition to interest, may be awarded upon the amount of the judgment."

Counsel concede that there undoubtedly is no hard and fast rule by which it can be determined whether or not it appears that an appeal has been sued out merely for delay. No Petitioner or Appellant would ever admit it was appealing merely for the purpose of delaying the enforcement of the judgment. However, various circumstances may indicate such purpose, and Respondent desires to point out these various circumstances, which when taken together, clearly indicate a deliberate design to prolong this litigation merely for the purpose of delay.

In the summer of 1937, when the Respondent, as a patient of the Principal Defendants, demanded compensation for his injuries, Petitioner's representatives investigated the claim and assured the Principal Defendants that they were fully covered under the policy (R., p. 40), and further instructed the Principal Defendants to contact their attorney in Saginaw if a suit was threatened or commenced. This was done and a settlement for Respondent's injuries was discussed and offered by the Petitioner's attorney (R., p. 42) and still later a more substantial offer or settlement was made by the attorney representing the Petitioner (R., p. 115). These offers were never accepted. A lengthy trial was had, and the same attorneys who now are appearing for the Petitioner, then appeared and defended the Principal Defendants. After the verdict was rendered, though a

motion for a new trial was made (R., p. iv), the judgment finally entered was never appealed from, for the obvious reason that the attorneys who represented both the Principal Defendants and the Petitioner, concluded that Respondent was entitled to the damages so sustained. The Writ of Garnishment issued and served, gave Petitioner until March 31, 1939, or twenty-one days in which to file its Disclosure in the State Court. Petitioner willfully ignored the command of the Writ and never filed any Disclosure in any court up to that time. Instead, Petitioner chose to delay the proceeding by moving the State Court for an Order transferring said cause, which motion was denied (R., p. 19). Instead of abiding by such order, Petitioner chose to delay said matter still longer by ignoring said order and thereupon filed, ex parte, certain papers and instruments in the Federal District Court (R., p. 20) which had no jurisdiction whatever over said cause. On April 15, 1939, after the Federal Court refused to accept jurisdiction, one of the attorneys for Petitioner admitted to Respondent's attorney that the Petitioner's insurance company "had given the Plaintiff the run-around long enough" and said attorney for Petitioner further stated that "he did not especially care to proceed with said case; that if the above case had been handled the way it should have been and the way he wanted to handle it, that it would have been settled long ago" (R., p. 84). At the same time, said Petitioner's attorney again attempted to settle said cause (R., p. 86). Shortly thereafter, and well knowing that an Order of Remand was not applicable, one of Petitioner's attorneys, in an endeavor to exact a favor from one of the Principal Defendants, deliberately threatened to appeal said cause to the Circuit Court of Appeals in Cincinnati, and thereby put the Principal Defendants to additional attorney fees and expenses (R. p. 90). This obviously was merely a threat to delay the proceedings.

After the Michigan Supreme Court affirmed the Lower Court, one of the attorneys for Petitioner wrote to Respondent's attorney, and the full context of the letter is included herein (Amended R., p. 74), and requested a statement of the amount due in the case and stated that

he would "arrange to see that it is taken care of immediately." Instead of paying said judgment, as promised, Petitioner deliberately sought to delay said proceeding further by filing an Application for Rehearing and in same, for the first time, claimed that certain Federal rights had been violated, though such claim had never been made or raised before. Respondent contends that where the decisions of the United States Supreme Court are so clearly patent and uniform, in holding that an Order of Remand is not appealable, and in holding that Federal questions raised for the first time on a Petition for Rehearing cannot be considered on appeal, and where an appeal is nevertheless taken, that same is clearly for the purpose of delaying the enforcement of the judgment.

In view of all of the foregoing facts and circumstances, Respondent contends that Petitioner's entire course of conduct throughout the entire proceedings, is clearly indicative of the fact that this appeal was sued out merely for the purpose of delay, and that therefore additional damages should be assessed against the Petitioner under the Court rule to partially compensate him for this delay and his added expense.

CONCLUSION

Petitioner, throughout its Petition and Brief, prefaces its arguments with the words "if the cause was removable," and continually speaks of a "proper" Petition. Respondent contends that the State Court decided that a proper Petition was not filed and that the cause was not removable. And more important, the Federal District Court, when it remanded the cause, definitely determined that the cause was not removable and such determination is and was final. This court has consistently so held. And likewise this court has consistently held that Federal questions raised for the first time on a Petition for Rehearing, will not and cannot be considered. The Petition must be dismissed.

The position of Petitioner, as set forth in its Petition, is the same as set forth in its Motion for a Rehearing and

Supporting Brief. Such position was fully answered in Respondent's Answer to the Motion for Rehearing and Supporting Brief, and said Answer is appended hereto as a part of the Amended Record. Respondent incorporates the authorities therein cited in further support of its Brief filed herein and respectfully refers this court to same and especially to pages 1 to 3 thereof, for further answer to any of the questions raised by the Petitioner herein.

Respectfully submitted,

B. A. WENDOW,

A. A. WORCESTER,

D. H. WORCESTER,

ARCHIBALD BROOMFIELD,

Attorneys for Respondent.

AMENDED RECORD

STATE OF MICHIGAN
IN THE
SUPREME COURT
APPEAL FROM ISABELLA CIRCUIT COURT
Hon. Ray Hart, Circuit Judge

FRANK STEVENS,

Plaintiff and Appellee,

vs.

Cal. No. 40692.

R. A. NORTHWAY, doing business
under the assumed name of North-
way Clinic and Hospital, R. A.
NORTHWAY, ROY B. FISHER,
Principal Defendants,

THE METROPOLITAN CASUALTY
INSURANCE COMPANY OF NEW YORK,
a foreign corporation,
*Garnishee Defendant and
Appellant.*

BRIEF FOR PLAINTIFF, OPPOSING
MOTION FOR RE-HEARING

B. A. WENDROW,
WORCESTER & WORCESTER,
*Attorneys for Plaintiff
and Appellee.*

Business Address:

Commercial Building,
Mt. Pleasant, Michigan.

Received April 30, 1940, Jay Mertz, Clerk Supreme Court.

AUTHORITIES CITED BY PLAINTIFF

Page

American Automobile Insurance Company vs. Frundt, et al (103 F. (2d) 613, C. C. A., 7th Circuit, April 27, 1939)	14
3 Am. Jurisprudence, 346, 347	38
American Surety Company, Plff. in certiorari vs. Vivian F. Baldwin, et al., Vivian F. Baldwin, et al, vs. American Surety Company (287 U. S. 156, 77 L. Ed. 231, 53 S. Ct. 98, November 14, 1932)....	41
Badger vs. Boyd, (65 S. W. (2d) 601)	39
Bishop & Babcock Sales Company of Ohio vs. Lackman (4 S. W. (2d) 109, Texas C. A., 1928)	22
Blankenship vs. Blankenship, (276 Pac. 9, Nevada, 1929)	40
Blatchford vs. Newberry, (106 Ill. 584, 592)	39
Brueker vs. Georgia Casualty Company (14 F. (2d) 688)	12
Burr vs. Heffner, (289 Mich. 91, 286 N. W. 169)	16
Chicago, St. Paul, Minneapolis & Omaha Railway Co. vs. Hensley (25, F. (2d) page 861, C. C. A. 8th Circuit, 1928)	27, 32
4 Corpus Juris, 624	38
Employers Reinsurance Corp. vs. Bryant, U. S. District Judge (229 U. S. 374, 81, L. Ed. 289, 57 S. C. 273)	28
Federal Land Bank of St. Louis, a corporation, Petitioner, vs. A. B. Priddy, Circuit Judge (295 U. S. 229, 79 L. Ed. 1408)	15
Gaskill vs. Weeks, (156 Mich. 668)	38
Hollowbush vs. McConnel, (12 Ill. 203)	39
Hutchins vs. Kimmell, (31 Mich. 126)	38

(Figures in brackets [] refer to page number of printed Brief for Plaintiff, Opposing Motion for Re-hearing)

Hutchinson vs. Arnt (41 N. E. (2d) 585, 4 N. E. (2d) 202, Indiana, 1936)	41
In re: Satterley (102 F. (2d) 144, C. C. A., 5th Circuit, March 3, 1939)	30
Iron Cliffs Company vs. Edward Lahias, (52 Mich. 394)	9
George E. Kniess vs. Armour & Co. Appt., and Charles J. Burmeister (132 Ohio State 432, 17 N. E. (2d) 734, November 30, 1938)	15
Kraft vs. Raths, (45 Mich. 20)	38
Lahman vs. Supernaw, et al (47 F. (2d) page 610, District Court, N. D. Oklahoma)	12
Robert Laidlaw vs. Catherine L. Morrow, (44 Mich. at Page 550)	9
Lawley et al. vs. Whiteis et al. (24 F. Supp. 698, September 28, 1938)	10, 13
Lee vs. Continental Insurance Company (292 F. 410)	6
Lewis vs. Weidenfeld (114 Mich. 581)	18
Louisville R. R. vs. U. S. Fidelity Co., (Tenn.) (148 S. W. 671)	39
Leslie vs. Floyd Gas. Co., (11 F. Supp. 401)	26
Missouri Pacific Railway Company vs. Mary Fitzgerald (160 U. S. 556, 40 Law Ed. 536)	26
MacLean vs. Scripps, (52 Mich. 214)	38
Milwaukee Bridge & Iron Works vs. Henry N. Brevoort, Wayne Circuit Judge, (73 Mich. at Page 157)	9
Moffet et al vs. Robbins, (14 Fed. Supp. 602, D. C. Kan. September 4, 1935)	33
Morgan vs. Kroger Grocery & Baking Co. (96 F. (2d) 470, C. C. A. 8th Circuit)	21
Samuel Nelson vs. Dennis Moloney (174 U. S. 164, 43 Law Ed. 923)	27
Nichols, Shepard & Co. vs. March, (62 Mich. 439)	38

Buck Owens, et al. vs. Hagenbeck Wallace Shows Co., (192 A. 158, 464, Rhode Island, 1937)	39
Pacific Livestock Co. vs. Lewis, (241 U. S. 440; 6 L. ed. 1084)	26
Parker vs. State (Ind. 33·N. E. 119)	39
E. A. Pearson vs. Joseph Zacher, Western Surety Company, Garnishee, (177 Minn. 182, 1929)	4, 23
John Roberts vs. Chicago, St. Paul, Minneapolis & Omaha Railway Company, (48 Minn. 521)	19, 23
Ryerson vs. Eldred, (18 Mich. 49)	40
Seymour vs. Detroit C. & B. Rolling Mills, (56 Mich. 117, 123)	39
Shea vs. Pilette (189 A. 154, Vermont, 1937)	41
Sioux City & St. Paul R. Co. vs. U. S., (160 U. S. 686 — 40 L. Ed. 583)	39
Spitzley vs. Garrison, (208 Mich. 50)	38
Stacy vs. Glen Ellyn Hotel & Springs Co., (Ih.) 79 N. E. 133	39
Taylor vs. Boardman (24 Mich. 287, 302)	39
Toney vs. Maryland Casualty Company (29 F. Supp. 785, D. C. W. D. Virginia, October 28, 1939)	14
Tracy Loan & Trust Co. vs. Mutual Life Insurance Co. of New York, et al, (79 Utah 33, 1932)	17, 20, 22
Thompson vs. Jarvis, (40 Mich. 526)	38
Travelers Protective Ass'n of America, vs. Smith, (71 Fed. (2d) 511)	26
Wilcox vs. Board of Commissioners of Sinking Fund of City of Detroit (262 Mich. 699)	40
Wyngarden vs. LaHuis, (251 Mich. 276)	9
Yankaus vs. Feltenstein (244 U. S. 127)	31

STATE OF MICHIGAN
IN THE
SUPREME COURT

APPEAL FROM ISABELLA CIRCUIT COURT

Hon. Ray Hart, Circuit Judge

FRANK STEVENS,
Plaintiff and Appellee,

vs.

Cal. No. 40692.

R. A. NORTHWAY, doing business
under the assumed name of North-
way Clinic and Hospital, R. A.

NORTHWAY, ROY B. FISHER,
Principal Defendants,

THE METROPOLITAN CASUALTY
INSURANCE COMPANY OF NEW YORK,
a foreign corporation,

*Garnishee Defendant and
Appellant.*

BRIEF FOR PLAINTIFF, OPPOSING
MOTION FOR RE-HEARING

Now comes the above named Plaintiff and Appellee, Frank Stevens, and objects to the granting of Garnishee Defendant's and Appellant's Application for re-hearing, for the following reasons:

1. The State Court had the right and the duty to pass upon the sufficiency of the petition for removal. (See discussion and authorities, pages 3 to 7).

2. After certification, it was the duty of the Federal Court to pass upon the question of removability and to

retain or remand the cause. (See discussion and authorities, pages 7 to 8).

3. Garnishment, under Michigan Statutes and decisions, is an ancillary proceeding not an independent suit. (See discussion and authorities, pages 8 to 11).

4. The Federal Courts respect the decisions of State Courts interpreting their own state statutes and are bound thereby. (See discussion and authorities, pages 12 to 13).

5. The order of the Federal District Court remanding the cause back to the State Court is binding upon the State Courts and cannot be reviewed by them. (See discussion and authorities, pages 17 to 19).

6. Where a cause is removed from a State Court to a Federal Court and thereafter remanded to the State Court, the Federal Court acquires no jurisdiction further than that necessary to remand said cause, and any other action taken therein, by either the court or the parties, is void. (See discussion and authorities, pages 19 to 22).

7. In a cause removed and later remanded by the Federal Court, any action of the State Court made in the interval is valid. (See discussion and authorities, pages 22 to 24).

8. The default and judgment herein relied upon were taken after order remanding cause was filed in State Court. (See discussion and authorities, page 25).

9. The order of the Federal District Court remanding the cause back to the State Court was final and

[3]

unappealable. (See discussion and authorities, pages 25 to 30).

10. The order of the Federal District Court remanding the cause back to the State Court could not be attacked directly, indirectly, or collaterally. (See discussion and authorities, pages 31 to 34).

11. The Garnishee Defendant never asserted its at-

tempt to remove said cause in good faith, and is not acting in good faith in its application for a re-hearing. (See discussion and authorities, pages 34 to 37).

12. All the questions presented in the Garnishee Defendant's application for a re-hearing were fully argued and considered by the Supreme Court in its former hearing. (See discussion and authorities, pages 37 to 39).

13. Questions not raised on appeal will not be considered by this court on re-hearing, nor by Federal Court on review. (See discussion and authorities, pages 39 to 44).

1. The State Court had the right and the duty to pass upon the sufficiency of the Petition for Removal presented to it, in which Petition the Garnishee Defendant sought an Order removing said cause to the United States District Court.

The authorities which sustain such proposition were cited on page 16 of Plaintiff's Reply Brief on file in this Court, and to which Plaintiff now refers this Court for the purpose of brevity. The same rule was followed in *John Roberts vs. Chicago, St. Paul, Minneapolis & Omaha Railway Company* (48 Minn. 521) which was cited by the Garnishee in its Application.

[4]

In the case at bar, the Petition for Removal presented by the Garnishee to the State Court, showed on its face that there was not only an absence of the diversity of citizenship requirement, but also that the matter which the Petitioner was seeking to have removed was an ancillary proceeding and not an independent or separable controversy.

The reasons for the rule above stated are very ably discussed in a much later Minnesota case, in which case the question of the State Court's right to pass upon the sufficiency of the petition also involved a garnishment action. In this case, *E. A. Pearson vs. Joseph Zacher*,

Western Surety Company, Garnishee, (177 Minn. 182, 1929) the Court said: .

"1. It is the claim that the state court had no jurisdiction because of the removal to the federal court. The garnishee says that the state court has no control over the application. This assertion is true only in a limited sense. It must not be understood that the state court has no duty in relation to such application. *It is charged with the duty of determining whether the record presented to it shows upon its face that the applicant has a right to the removal.* It will not yield its jurisdiction until a *legally sufficient record* has been presented, and it is its duty in every case to examine the petition and bond. This is necessary for it to 'accept' them within the meaning of Judicial Code, Sec. 29, USCA, Sec. 72, 36 St. 1095. This is necessary to judicially inform the state court that its power over the cause has been suspended. The mere filing of a petition and bond for the removal of a suit *which it not removable* does not work a transfer. The contents of the papers must disclose the right. *Kowalski v. C. & N. W. Ry. Co.*, 159 Minn. 388, 199 N. W. 178; *Stone v. South Carolina*, 117 U. S. 430, 6 S. Ct. 799, 29

[5]

L. ed. 962; *C. & O. Ry. Co. v. Cockrell*, 232 U. S. 146, 34 S. Ct. 278, 58 L. ed. 544; *Miner v. C. B. & Q. R. Co.*, 147 Minn. 21, 179 N. W. 483; *Roberts v. C. St. P. M. & O. Ry. Co.*, 48 Minn. 521, 51 N. W. 478; *Id. (C. C.)* 45 F. 433; 28 USCA, Sec. 72, notes 325 and 326, p. 499, and note 371, p. 516.

"2. The application papers in this case showed upon their face that they were *legally insufficient because they disclosed to the state court that the only matter involved was a garnishment proceeding.* Such a proceeding is not an independent suit. It is an auxiliary proceeding. It is a mode of execution. It is a means to satisfy the judgment out of the debtor's property. 3 Dunnell, Minn. Dig (2 ed.) Sec. 3949. It

is grafted upon the main suit by statute. It is inseparably connected with the judgment. It is an incidental proceeding in comparison with the main suit. If such proceedings were transferred to the federal court we would have the anomalous situation of that court's engaging in a proceeding to collect a judgment over which it had no jurisdiction. The authorities hold that a garnishment proceeding is not removable. 28 USCA, Sec. 71, note 106, p. 66; Poole v. Thatcherdeft (C. C.) 19 F. 49; Bank v. Turnbull & Co., 16 Wall. 190, 21 L. ed. 296; Brucker v. Georgia Cas. Co. (D. C.) 14 F. (2d) 688.

"3. All the authorities speak of the necessity of the petition's showing its legal sufficiency. 28 USCA, Sec. 372, note, 372, p. 519, and note 373, p. 520. St. Anthony Falls W. P. Co. v. King W. I. Bridge Co., 23 Minn. 186, 23 Am. R. 682; Scheffer v. National Life Ins. Co., 25 Minn. 534. It would therefore seem that *when this necessary showing is absent the application is inoperative to change the jurisdiction*, and the state court may still act because the removal proceedings are a nullity."

[6]

At the hearing on April 15, 1939, on the Garnishee's Petition for Removal, the Circuit Judge gave his reasons for denying same. A certified copy of the transcript of the proceedings on said day was filed by the Garnishee in the Federal Court, and an examination of such transcript shows that the Circuit Judge stated in his opinion that one of the reasons, among others, for denying the Garnishee's Petition, was that: "The garnishment proceeding is ancillary to the main case. This action is for the sole and only purpose of collecting a judgment heretofore rendered against the Principal Defendants, and this Petition is brought by attorneys for the insurance company, who were the same attorneys who appeared for Mr. Northway in the trial of the case, and therefore their information goes to both parties. I am inclined, therefore, to deny the motion and refuse to sign the Order."

Also see the recent case of *Lee vs. Continental Insurance Company* (292 F. 410) in which the Court held that the petition for removal and bond must be presented to the lower court to determine their sufficiency, and in which case the court interprets the word "accept" in the Judicial Code to mean "grant." In other words, the Court holds that before a State Court can grant the petition, it must first examine the contents for the purpose of seeing if facts constituting a removable cause are shown.

We submit, therefore, that because of the insufficiency of the Garnishee's Petition for Removal, that the trial court not only had a legal right to examine into the sufficiency of the Petition for Removal, but that it was its duty to do so; that the insufficiencies were apparent, and that its decision was not only correct, but

[7]

was confirmed by the order of the Federal Court remanding the cause.

2. Even assuming, for the purpose of argument only, that the State Court had no right to pass upon the sufficiency of the Petition for Removal presented to it, nevertheless, the Federal District Court, under the United States Code, had the right to pass upon the Motion to Remand said cause back to the State Court.

We believe that counsel for Garnishee Defendant in their Application concede the correctness of the foregoing statement of law, but to avoid the possibility of any argument over the power and authority of the Federal Court on this question of remand, we herewith quote the entire context of *Paragraph 80, Title 28, U. S. C. C.*:

"If in any suit commenced in a District Court, or removed from a State Court to a District Court of the United States, it shall appear to the satisfaction of the said District Court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a

dispute or controversy properly within the jurisdiction of said District Court, or that the parties to said suit have been improperly or collusively made or joined, either as Plaintiffs or Defendants, for the purpose of creating a case cognizable or removable under this chapter, the said District Court *shall* proceed no further therein, but *shall* dismiss the suit or remand it to the court from which it was removed, as justice may require, and shall make such order as to costs as shall be just."

On April 15, 1939 attorneys for all of the respective parties were present before the Honorable Judge Tuttle,

[8]

and the Motion to Remand was thoroughly argued, as well as the law involved, and as Attorney Stanton, who was present in Federal Court on said day, wrote to his co-counsel, Attorney Frederick J. Ward in Detroit (See Exhibit C attached to Garnishee Defendant's Answer to Plaintiffs' Motion to Dismiss, on file in the Supreme Court):

"Dear Mr. Ward:

The Motion to Remand was argued before Judge Tuttle, and he followed about the same line of reasoning that I thought he would in this case * * *. He decided to remand the case * * * he said that this was an ancillary proceeding, and if he was to allow the transfer, it would promote considerable confusion, AND HE ANALYZED THE QUESTION VERY CAREFULLY." (Our caps).

3. The action of Garnishment, under the Michigan statutes, and under the decisions of the Michigan Supreme Court interpreting same, is an ancillary proceeding and not an independent suit.

It is unnecessary to quote provisions of the Michigan statutes. A cursory examination immediately reveals that Circuit Court garnishment in Michigan under the

statute is an ancillary proceeding which arises out of and depends entirely upon the principal suit. Our State Courts have uniformly held, without exception, and from an early date, that in Michigan garnishment is an ancillary, not an independent action.

“It (garnishment) is only incident to the main case and it must fall when that falls. Section 6449.”

[9]

Robert Laidlaw vs. Catherine L. Morrow, 44 Mich. at Page 550.

Iron Cliffs Company vs. Edward Lahais, 52 Mich. 394.

“Section 8145. How. Stat., provides how suits may be commenced in the Circuit Courts of this State against foreign corporations. The Writ of Garnishment and proceedings thereon are always ancillary, and the service of such Writ is not the commencement of an action.” *The Milwaukee Bridge & Iron Works vs. Henry N. Breevort, Wayne Circuit Judge*, 73 Mich., at Page 157.

“The situation must depend upon the principal suit commenced. Garnishment is ancillary and not the commencement of an action.” *Wynngarden vs. Lahuis*, 251 Mich. 276.

This Court merely affirmed this long established rule of law in its opinion in this case when it said:

“The garnishment proceeding is ancillary to the action against the principal Defendants and wholly dependent thereon and not the commencement of an independent action.”

Counsel for Garnishee lay great stress upon the case of *Reed vs. Bloom* (19 Fed. Supp. 7; Oklahoma, May 1, 1936), and quote nearly the entire case in Part I of their Application — we say “nearly” because, should we say, inadvertently all of the provisions of the Oklahoma statute upon which Judge Vaught based his de-

cision, were omitted by counsel for Garnishee. The otherwise seemingly unusual conclusion reached by Judge Vaught is easily understood when the full case is read.

[10]

The omissions of these statutory provisions from Garnishee's Brief are all the more obvious in view of the later case of *Lawley, et al. vs. Whiteis, et al. (American Surety Company of New York, Garnishee)* (24 Fed. Supp. 698, D. C., N. D., Oklahoma, September 28, 1938) decided by Judge Kennamer in the same Federal District, supporting the general rule and emphasizing the distinction due to the particular statute therein involved. This later decision carefully discusses the statutory provisions which were omitted by counsel for Garnishee from their Brief on Application for re-hearing. The *Lawley* case is referred to in the Citators and is cited, mentioned, and discussed in practically all of the later cases affecting or involving the question of remand.

Judge Kennamer in the *Lawley* case discusses the particular Oklahoma statutory provisions upon which *Reed vs. Bloom* was decided, and, for the benefit of this Court, we now quote, from the *Reed vs. Bloom* decision itself, some of the pertinent parts of those statutory provisions:

"Section 3708 * * * such motor carrier shall have filed with the Corporation Commission a liability insurance policy * * * and, after judgment against the carrier for any such damage, *the injured party may maintain an action upon such policy or bond to recover the same, and shall be a proper party so to do.*

* * *

"And in section 625 the statute provides: "The proceedings against a garnishee shall be deemed an action by the Plaintiff against Garnishee and Defendant, as parties defendant, and all the provisions for enforcing judgment shall be applicable thereto.

* * *

"As stated before, the Oklahoma statute, section 3708, supra, makes no reference to a garnishment proceeding, but says: 'After judgment against the carrier for any such damage, the injured party may maintain an action upon such policy or bond to recover the same, and shall be a proper party so to do,' clearly indicating that the Plaintiff, since the rendition of the judgment in the State Court, stands, as it were, in the shoes of the insured, and has the right to maintain the action."

As Judge Kennamer so ably pointed out in the *Lawley* case, the foregoing section 3708 is a distinct and separate statute under which the insurer *must be* joined as a party defendant in the original suit (*Enders vs. Longmire*, 179 Ok. 633, 67 p. (2d) Page 12) and Section 625 (Supra) comes under the Chapter on "Attachment and Garnishment". And likewise, as Judge Kennamer clearly points out, under the Oklahoma statutes, garnishment proceedings *may be* independent proceedings. A careful reading of the *Lawley* case indicates, as pointed out, that the various decisions of the Oklahoma Supreme Court interpreting garnishment statutes and proceedings, deal with the *other* provisions of the garnishment statutes which come under the Chapter of "Execution", and under which, garnishment is and always has been held by the Oklahoma Supreme Court to be an ancillary proceeding.

In view of the apparent reliance placed upon *Reed vs. Bloom* by counsel for Garnishee, we deemed it advisable to place before this Court the entire *Lawley* case, including all statutory provisions therein quoted and relied upon. It will be found following the Conclusion of this Brief.

4. The Federal courts are bound by the construction given State Statutes, including Garnishment Statutes, by the State Courts, and the Federal Courts respect the decisions of State Courts interpreting their own State Statutes.

Counsel for Garnishee entirely ignore the fact that the Federal District Court in Bay City passed upon the question of the nature of a garnishment action under the Michigan statutes. This Court has established the fact that in Michigan garnishment is an ancillary proceeding. The Federal Court correctly followed this interpretation of the Michigan garnishment statute.

"A garnishment proceeding, provided by the statutes of Missouri, as construed by the Courts of the State, is not an independent suit, but is supplemental to the main action and provides one of the means of securing a satisfaction of the Judgment. This is the interpretation that the Courts of Missouri have placed upon the state — — All of the Missouri cases seem to be to the same effect. *The construction thus given the statute is not to be ignored in this Court.*" *Brucker vs. Georgia Casualty Company*, 14 F. (2d) 688.

In *Lahman vs. Supernaw, et al.* (47 F. (2d) page 610, District Court, N. D. Oklahoma) the learned District Judge, Franklin E. Kennamer, followed the construction placed upon the Oklahoma garnishment statute by the Oklahoma Supreme Court. In its opinion, the Court held:

"I am of the opinion that the Motion to Remand should be sustained. In the case of *Davidson, et al. vs. Finley, et al.*, 96 Okla. 291, it was held that garnishment proceedings in aid of execution 'is practically only an equitable execution brought for the pur-

may be issued only from the court in which the judgment was rendered. The issuance of an execution for the purpose of obtaining a satisfaction of the judgment is not an independent action."

In a still later decision, Federal Judge Kennamer again reiterated the foregoing rule of law in the case of *Lawley et al. vs. Whitesis et al.* (24 F. Supp. 698, September 28, 1938), wherein he stated:

"The Supreme Court of Oklahoma has determined that garnishment after judgment is practically an equitable execution brought for the purpose of reaching nonleviable assets and is a means provided for obtaining satisfaction of a judgment of a creditor out of the property of the debtor. See *First National Bank of Cordell v. City Guaranty Bank of Hobart*, 174 Okl. 545, 51 P. 2d 573; *Davidson v. Finley*, 96 Okl. 291, 222 P. 678. It is thus well established that the proceedings in garnishment after judgment, is auxiliary to the main case and is only a means provided for obtaining satisfaction of a judgment. It has been construed by the Supreme Court of Oklahoma to partake of an equitable execution. *The construction of the Statutes of Oklahoma governing garnishment proceedings after judgment, is binding upon this court.* *Erie R. Co. v. Tompkins*, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A. L. R. 1487; *Ruhlin v. New York Life Insurance Company*, 304 U. S. 202, 58 S. Ct. 860, 82 L. Ed. 1290.

"Since the rendition of the decisions in *Erie R. Co. v. Tompkins*, supra, and *Ruhlin v. New York Life Ins. Co.*, supra, this court is bound by the construction placed upon garnishment proceedings similar to those involved here, by the Oklahoma Supreme Court, rather than expressions from other Federal Courts with respect to garnishment gener-

not controlling. However, no Federal case has been cited which involves Statutes *identical* with the provisions of the Oklahoma Code."

In *American Automobile Insurance Company vs. Freundt, et al* (103 F. (2d) 613, C. C. A., 7th Circuit, April 27, 1939) the same question arose and the Circuit Court of Appeals followed the decisions of the Supreme Court of Illinois interpreting the Illinois garnishment statutes. In this case Plaintiff had recovered judgment against the Principal Defendants and Plaintiff had commenced garnishment proceedings against the Principal Defendant's insurer; the insurer sought to have its liability determined in Federal Court, under the Federal Declaratory Judgment statute, rather than in the State Court in a garnishment action. The Circuit Court of Appeals held that it was bound by the decisions of the Illinois Supreme Court holding that garnishment was merely an ancillary proceeding, and that therefore the issue as between the Plaintiff and the insurer could only be settled in the State Court in the garnishment action. The Federal Court recognized the foregoing rule of law by saying:

"The only remaining question in which the insurer is interested in whether the judgment creditor can realize upon the contractual obligation of the insurer to protect the insured. Under the law of Illinois as applied to the facts of this case this question can be adjudicated in the pending suit against the insured."

In a still later Federal case, *Toney vs. Maryland Casualty Company* (29 F. Supp. 785, D. C., W. D. Virginia, October 28, 1939) the Court held:

[15]

"The sole question in the case is whether this garnishment under the applicable Virginia statute is an ancillary proceeding.

* * *

"(5) It is not necessary for me, in sustaining the motion to remand, to express concurrence in these opinions holding that garnishment proceedings are

(even under the statutes of the states in question) in their essential nature independent actions. Nor need I hold that an unusual and extreme statute cannot make garnishments really independent actions rather than ancillary proceedings. *All that I need decide here, and all that I do decide, is that under the Virginia Statutes garnishments are mere ancillary proceedings which are not removable from a state to a federal court.*"

In *Federal Land Bank of St. Louis, a corporation, Petitioner vs. A. B. Priddy, Circuit Judge* (295 U. S. 229, 79 L. Ed. 1408) the Supreme Court of the United States affirmed the rule that:

"the ruling of the State Supreme Court that Petitioner is a foreign corporation within the meaning of the Arkansas attachment statute, and that the attachment was authorized by local law, presents only a state question, which is not open for review here."

A very recent case which supports Proposition 4 is the case of *George E. Knies vs. Armour & Co. Appt., and Charles J. Burmeister* (134 Ohio State 432, 17 N. E. (2d) 734, November 30, 1938). The Court said:

"It has always been held that the law of the state from which removal is sought determines whether the controversy is a separable one. *Cincinnati, N. O. & T. P. R. Co. v. Bohon*, 200 U. S. 221, 26 S. Ct. 166, 50 L. Ed. 448, 4 Ann. Cas. 1152; *Chicago & Alton Ry. Co. v. McWhirt*, 243 U. S. 422, 37 S. Ct. 392,

[16]

61 L. Ed. 826; *Chicago, Rock Island & Pacific Ry. Co. v. Dowell*, 229 U. S. 102, 33 S. Ct. 684, 57 L. Ed. 1090; *Norwalk, adm'x, v. Air-Way Electric Appliance Corp.*, 2 Cir., 87 F. 2d 317, 110 A. L. R. 183, and see annotation at page 191."

In another very recent case argued before the Supreme Court of the United States in the October, 1939 term,

that court decided in a writ of certiorari to the Supreme Court of Michigan a judgment affirming the judgment of the Circuit Court of Wayne County against the Plaintiff or Garnishee Defendant (See *Burr vs. Heffner*, 289 Mich. 91, 286 N. W. 169), that the nature and availability of garnishment in Michigan is solely a question of state law as determined by the state statutes, and by the decisions of the Michigan Supreme Court interpreting such garnishment statutes. Also see *Jacobs and Chaney Michigan Digest, Cumulative Quarterly, April, 1940 No. 2, at page 40.*

But more important, the United States Supreme Court in this *Burr* case affirmed the rule of law that the Federal Courts will be bound by the construction placed by the State Courts upon their state statutes, and held that in Michigan a Writ of garnishment is a civil process of law, in the nature of equitable attachment. We quote from the opinion:

"Garnishment and attachment commonly are part and parcel of the process, provided by statute, for the collection of debts. In Michigan a writ of garnishment is a civil process at law, in the nature of an equitable attachment. See *Posselius v. First Nat. Bank*, 264 Mich. 687, 251 N. W. 429, 90 A. L. R. 342.

* * *

"Petitioner claims that execution should not have been allowed under the judgment. The Act

[17]

permits the Administrator 'to sue and be sued in any court of competent jurisdiction, State or Federal.' Whether by Michigan law execution under such a judgment may be had is, like the availability of garnishment, *Federal Land Bank v. Priddy*, supra, (295 U. S. 229, 79 L. Ed. 1408, 55 S. Ct. 705) a state question."

5. The Order of the Federal District Court remanding the cause back to the State Court was binding upon the State Courts and could not be reviewed by them.

Counsel for Garnishee, throughout their entire Application, appear to claim that this cause should still be transferred to a Federal Court, and are in effect still claiming that this cause was a removable one. In answer thereto, we can only say that the Federal District Court on April 15, 1939, decided once and for all that said cause should be remanded, and on that day did remand it. In making its Order of Remand it must have decided that the facts contained in the Petition to Remove were insufficient and that the Petition was not a "proper" petition. In other words, the Federal Court decided that the cause never was in fact removable.

We submit that the decision of the Federal District Court holding that the cause never was in fact removable was binding upon the State Circuit Court and is binding upon the State Supreme Court and that the Garnishee cannot now ask this Court to decide otherwise. See P. 71, Title 28, USCA.

In *Tracy Loan & Trust Co. vs. Mutual Life Insurance Co. of New York, et al* (79 Utah 33, 1932), the Court held:

[18]

"The State Court cannot review or correct the ruling of the Federal Court, but must proceed to exercise the jurisdiction over the case which the Federal Court in effect has declared it had no power to supersede. *Feeney v. Wabash R. Co.* (123 Mo. App. 420, 99 S. W. 477.)"

"This seems to be an attempt to call on this Court to review the decision of the Federal Court in remanding the cause. This we may not do. *Whatever reasons the Federal Court may have had for making its Order remanding the cause, such decision by the Federal Court is final and conclusive and is not subject to review in this Court. Rio Grande Western R. Co.*

v. Telluride Power Transmission Co., 23 Utah, 22, 63 P. 995.”

The rule of law involved herein is clearly set forth in 114 A. L. R., at Page 1477, wherein we find the following:

“Specifically referring to the Federal statute whereby it is provided that the order of the inferior Federal Court remanding the cause to the State Court shall be immediately carried into execution, and that no appeal or writ of error from the decision shall be allowed, *State Courts have held uniformly, albeit in varying phraseology, that the Order of Remand is not reviewable in the State Courts.*”

Substantiating this rule of law, the Reporter has cited approximately thirty-six cases on pages 1477, 1478 and 1479 of said annotation.

The Supreme Court of Michigan has likewise settled this question once and for all in *Lewis vs. Weidenfeld* (114 Mich. 581) at Page 590, wherein the Court said:

“Defendant Weidenfeld appeared specially, and moved to remove the case to the United States

[19]

Court. The State Court granted the order. The United States Court, upon motion, remanded the case to the State Court. It is now insisted that this order of the United States Court was erroneous, and that the State Court has no jurisdiction in the cause. This question is settled by the Supreme Court of the United States in *Missouri Pacific R. Co. v. Fitzgerald*, 160 U. S. 556. The Court in that case say, ‘If the Circuit Court remands a cause, and the State Court thereupon proceeds to final judgment, the action of the Circuit Court is not reviewable on writ of error to such judgment.’”

6. Where a cause is removed from a State Court to a Federal Court and thereafter remanded to the State Court, the Federal Court acquires no jurisdiction further than that necessary to remand said cause, and any other action taken therein, by either the Court or the parties, is void.

Even though this question was thoroughly considered in the law briefs heretofore filed in this Court in this cause, counsel for Garnishee are insisting in their Application that this Court again decide this particular question. We are not repeating the authorities previously cited by Plaintiff. They are set forth on Page 11 of Plaintiff's original Brief.

Counsel for Garnishee in Part II of their Application ignore the significance of the words "proper petition." This case was held once and for all time to be not removable, and was remanded to the State Court.

Counsel for Garnishee rely upon *John Roberts vs. Chicago, St. Paul, Minneapolis & Omaha Railway Company*, (48 Minn. 521, 1892) but despite the excerpt they have picked out from that decision, the Minnesota court

[20]

still held in that decision that the proceedings had in the Federal Court between the time of the attempted removal and the order of remand, were void. The reason was, as given by the Court, because the "proper" steps were not taken and therefore the cause never had been a removable cause.

The reasons for this rule are very ably set forth in *Tracy Loan & Trust Co. vs. Mutual Life Insurance Co. of New York, et al.* (79 Utah 33, 7 Pac. Rep. (2d) 279):

"(3) It is well settled that it is for the state Court to determine what effect, if any, shall be given pleadings filed or orders made in federal courts while the cause was pending there before remand. 54 C. J. 376; *Ayres v. Wiswall*, 112 U. S. 187, 5 S. Ct. 90, 28 L. Ed. 693; *Cates v. Allen*, 149 U. S. 451, 13 S. Ct. 883,

37 L. Ed. 804; *Broadway Insurance Co. v. Chicago G. W. R. Co.* (C. C.) 101 F. 507.

"The rule is stated in 54 C. J. 376, as follows: 'Where remand is based upon want of jurisdiction on the part of the Federal Court at the time of the removal, any findings and orders made by such court pending the remand are not binding, either upon the state court or upon the parties to litigation, except, perhaps, in so far as parties by consenting to such orders may have become bound as by contract; nor on the other hand, can any advantage of such orders be taken by the state court.'

"(4) This rule is well supported by cases which hold that, where remand is based on want of jurisdiction on the part of the federal court, any findings or orders made by such court during the time the case was there are void and are not binding upon the state court nor upon the parties. *Graves v. Corbin*, 132 U. S. 571, 10 S. Ct. 196, 33 L. Ed. 462; *Ayres v. Wiswall*, *supra*; *Deane v. Corbin*, 44 Ill. App. 463; *Floody v. Chicago, St. P., M. & O. R.*

[21]

Co., 104 Minn. 132, 116 N. W. 111; *Colburn v. Hill* (C. C. A.) 103 F. 340; *Early v. Beecher*, 7 Lea (75 Tenn.) 256; *Levinski v. Middlesex Banking Co.* (C. C. A.) 92 F. 449. An answer filed in such court under such circumstances is not recognized as a pleading in the cause, and does not serve to extend the time within which the party may plead to the complaint in the state court. *Citizens' Light, Power & T. Co. v. Usnik*, 26 N. M. 494, 194 P. 862; *Early v. Beecher*, *supra*. It has also been held that the filing of an answer and cross-complaint in the federal court after removal of the same from the state court did not operate as a waiver of the right in the defendant to file a plea of privilege for change of venue in the state court after the cause was remanded to it. *Bishop-Babcock Sales Co. v. Lackman* (Tex. Civ. App.) 4 S. W. (2d) 109. From this ruling it would logically follow that the answer and counterclaim

were ineffective as pleadings, and when the cause was remanded it stood in the state court as if no pleadings amounting to the entry of a general appearance had been filed. Removal of the cause to the federal court, followed by a remand, does not prevent the running of the time within which to take an appeal from a judgment rendered in the state court in the interim. *Finney v. American Bonding Co.*, 13 Idaho, 534, 90 P. 859, 91 P. 318; *Mills v. American Bonding Co.*, 13 Idaho, 556, 91 P. 381."

"We think it follows from these cases that the answer and counter claim filed in the Federal Court was without effect as to the initiation of the contest *because filed in a court without jurisdiction of the cause.*"

The case of *Morgan vs. Kroger Grocery & Baking Co.* (96 F. (2d) 470, C. C. A. 8th Circuit) cited by Garnishee in its Application, held that the cause was

[22]

actually removed at the time the Petition for Removal was presented to the State Court, because the Petition itself, read in the light of the Missouri statutes and decisions thereunder, which held that joint liability could not exist under the facts alleged by Plaintiff, and therefore a "proper" Petition was filed. Again, the Circuit Court of Appeals in this case held that a "proper" Petition was filed because, among other things, the cause was at the time in fact removable.

In *Bishop & Babcock Sales Company of Ohio vs. Lackman* (4 S. W. (2d) 109, Texas C. A.; 1928), the Texas court followed the rule laid down in *Tracy Loan & Trust Co. vs. Mutual Life Insurance Co. of New York, et al.*, to the effect that "it is well settled that, it is for the State Court to determine what effect, if any, shall be given pleadings filed or orders made in Federal Courts while the cause was pending there before remand." And because of the peculiar Texas statute, the Court held

as it did. And right here we point out to this Court that the *Lackman* (Texas) case is the only case which we were able to find, and likewise apparently the only case which counsel for Garnishee were able to find, which indicated an opinion contrary to the well established general rule above stated.

7. On the removal of a Cause, if it afterwards appears that the Suit was not a proper one for removal, and is remanded by the Federal Court, any act of the State Court made in the interval is valid.

This proposition was also thoroughly covered in Plaintiff's Brief now on file in this cause, and again for the sake of brevity, we refer this Court to pages 16, 17 and 18 therein, and especially the authorities cited on Page 18 of Plaintiff's Brief.

[23]

Counsel for Garnishee especially rely upon the case of *John Roberts vs. Chicago, St. Paul, Minneapolis & Omaha Railway Co.*, but despite the excerpt they have chosen therefrom, the Court nevertheless held that the judgment of \$21,905 which was given by the Court to the Plaintiff against the Garnishee Defendant during the interval in which the Garnishee claimed it was in Federal Court, was a valid judgment and was not affected by the subsequent remand of the case from the Federal Court to the State Court. In other words, the Court held that the judgment given in the interval between the attempted removal and the actual remand was a valid judgment, because, again, the cause was never "properly" removed. The *Roberts* case was eventually appealed to the United States Supreme Court and on December 7, 1896, as reported in 164 U. S. 703, application for a writ of certiorari was denied, and by such denial, the *United States Supreme Court* affirmed the holding of the lower District Court that the judgment, or act of the State Court made in the interval, was valid.

If counsel for Garnishee had run down, so to speak, the *Roberts* case in the Citator, they would have found a

still later Minnesota case which very clearly and unequivocally affirms the correctness of the proposition herein claimed by the Plaintiff. In this later Minnesota case of *E. A. Pearson vs. Joseph Zacher, Western Surety Company, Garnishee*, (177 Minn. 182, 1929) the Court held:

"It is sufficient for us to hold, as we do, that on such removal of a cause, if it afterward appears that the suit was not a proper one for removal and is remanded by the Federal Court, any act of the State Court made in the interval is valid. *Yankaus v. Feltenstein*, 244 U. S. 127, 37 S. Ct. 567,

[24]

61 L. Ed. 1036; *Western Indemnity Co. v. Kendall*, 27 Ariz. 342, 233 p. 583; *Union G. & O. Co. v. Indian-Tex Petroleum Co.* 203 Ky. 521, 263 S. W. 1; *Roberts v. C. St. P. M. & O. Ry. Co.* 48 Minn. 521, 51 N. W. 478; 34 Cyc. 1308."

The rule is again affirmed in *Tracy Loan & Trust Co. v. Mutual Life Insurance Company of New York, et al.* (79 Utah 33).

"But where a motion for removal is made and the petition is not effective for that purpose, or after removal the Federal Court remands the cause for want of jurisdiction, and in the interim orders are made or judgment entered by the State Court, these are valid notwithstanding they are made after attempted removal. *Yankaus v. Feltenstein*, 244 U. S. 127, 37 S. Ct. 567, 61 L. Ed. 1036; *State v. American Surety Co.*, 26 Idaho, 652, 145 P. 1097, Ann. Cas. 1916E, 209; *Western Indemnity Co. v. Kendall*, 27 Ariz. 342, 233 P. 583; *Union Gas & Oil Co. v. Indian-Tex Petroleum Co.*, 203 Ky. 521, 263 S. W. 1; *Foster's Federal Practice* (6th Ed.) 3041. The reason or theory underlying these results is that when a case is remanded by the Federal Court for want of jurisdiction, the State Court is regarded as never having lost its jurisdiction, and the Federal Court never acquired jurisdiction. *Finney v. American Bonding*

Co., supra; and *Germania Fire Insurance Co. v. Francis*, 52 Miss. 457, 24 Am. Rep. 675; 43 C. J. #45."

[25]

8. Even assuming, for the purpose of argument only, that acts of the State Court in the interval between the attempted removal and the actual remand, are not valid, then nevertheless there were valid acts done in the State Court and by the State Court after the order of remand was filed in the State Court, to substantiate the judgment which was entered against the Garnishee Defendant.

In discussing this proposition, we are particularly impressed by the apparently deliberate failure on the part of counsel for Garnishee to remember that the record in this case discloses that on April 17, 1939, AND AFTER THE ORDER OF REMAND WAS FILED IN THE STATE COURT, the default was re-entered by the Plaintiff against the Garnishee Defendant and judgment rendered in favor of the Plaintiff.

We are unable to find anything in Garnishee's Application which in any way attacks such default of April 17, 1939, entered after the Order of Remand was filed in the State Court, and we are unable to find any claim in Garnishee's Application that such default was not a valid and regularly entered default.

9. The Order of the Federal District Court remanding the cause back to the State Court was final and unappealable.

The provisions in *Paragraph 71, Title 28, U. S. C. A.* applicable, read:

"When any cause shall be removed from any State Court into any District Court of the United States, and the District Court shall decide that the cause was improperly removed, and order the same to be remanded to the State Court from whence it came, such remand shall be immediately

carried into execution, and no appeal or writ of error from the decision of the District Court so remanding such cause shall be allowed."

The books are replete with cases substantiating this proposition, and yet counsel for Garnishee in their Application are in effect now appealing to this Court and asking for a decision that they should be permitted to still get into Federal Court, and asking this Court to find that Federal District Judge Tuttle erred in his opinion that this cause never was a removable cause. The authorities do not sustain counsel, but even though the case was a removable one, Judge Tuttle decided otherwise. And his decision cannot be reviewed by any Federal Court or any State Court, directly or indirectly.

Pacific Live Stock Co. vs. Lewis, 241 U. S. 440; 60 L. Ed. 1084;

Missouri Pacific R. Co. vs. Fitzgerald, 160 U. S. 556; 580-583. 40 L. Ed. 536;

Travelers Protective Ass'n of America, vs. Smith, 71 Fed. (2d) 511;

Leslie vs. Floyd Gas Co., 11 F. Supp. 401;

Notes to U. S. C. A., Title 28, Sec. 71, page 392.

Also see *Missouri Pacific Railway Company vs. Mary Fitzgerald* (160 U. S. 556, 40 Law Ed. 536), wherein the Court held:

"As under the statute a remanding order of the Circuit Court is not reviewable by this Court on appeal or writ of error from or to that Court, so it would seem to follow that it cannot be reviewed on writ of error to a State Court, the prohibition being that 'no appeal or writ of error from the decision of the Circuit Court remanding such cause

shall be allowed.' And it is entirely clear that a writ of error cannot be maintained under Paragraph

709 in respect of such an order, where the State Court has rendered no decision against a Federal right out simply accepted the conclusion of the Circuit Court.

We regard this result as intended by Congress, in effectuation of the object of the act of March 3, 1887, to restrict the jurisdiction of the Circuit Court and to restrain the volume of litigation which, through the expansion of Federal jurisdiction in respect of the removal causes, had been pouring into the Courts of the United States." (Authorities cited).

Also see *Samuel Nelson vs. Dennis Moloney*, (174 U. S. 164, 43 Law Ed. 934).

In *Chicago, St. Paul, Minneapolis & Omaha Railway Co. vs. Hensley* (25 F. (2d) Page 861, C. C. A. 8th Circuit, 1928) it appears that the lower Federal District Court issued a temporary injunction restraining the State Court from acting, but that upon the hearing upon the merits, in which the Plaintiff moved to remand said cause, the Federal District Court rendered a decree vacating its temporary injunction and denied the Petition of the railway company seeking a permanent injunction to restrain the Plaintiff from collecting its \$14,000 judgment, and remanded the case to the State Court. The railway company appealed from the order of remand, and the Circuit Court of Appeals held:

"(1, 2) When the court below rendered its decree, the real and controlling issue was whether the case before the court had been properly removed to that court, so that it had jurisdiction to proceed and determine its merits. Plenary power had been granted to the federal court below, and

[28]

the duty had been imposed upon it to decide that issue. It had carefully considered it upon evidence and argument, and it adjudged that the case had not been properly removed; that it had no jurisdiction to try or determine the merits of the case.

Its decree put into effect that decision. From that decree the railway company has appealed, but this appeal is futile (1) because the decree is not reviewable by this court, since title 28, section 71, U. S. Code (28 USCA Sec. 71), provides that, 'whenever any cause shall be removed from any state court into any district court of the United States, and the district court shall decide that the cause was improperly removed, and order the same to be remanded to the state court from whence it came, such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the district court so remanding such cause shall be allowed';

Without going further into the vast number of authorities sustaining this proposition, we feel it is sufficient to call the Court's attention to the last word on the question, namely, the case of *Employers Reinsurance Corp. vs. Bryant*, U. S. District Judge (229 U. S. 374, 81 L. Ed. 289, 57 S. C. 273) which was decided by the United States Supreme Court on January 4, 1937. We have checked the Citator and find no later law by the United States Supreme Court on this particular phase of the law. In this case the Appellant applied for a writ of certiorari to review a judgment of the Circuit Court of Appeals for the 5th Circuit denying a Petition for writs of mandamus and prohibition directed to the judges of the District Court for the purpose of vacating an order of remand. The learned Justice Van Devanter delivered the opinion of the Court, stating:

[29]

"We are of opinion the petition was rightly denied, first, because the remanding order was not subject to appellate reexamination on petition for mandamus or otherwise, and, secondly, because even if open to reexamination on petition for mandamus, the order was made in the exercise of lawful authority and was appropriate to the situation in which it was made.

"A leading case on the subject is *In re Pennsylvania Co.*, 137 U. S. 451, which dealt with a petition for mandamus requiring the judges of a circuit court to reinstate, try and adjudicate a suit which they, in the circuit court, had remanded to the state court whence it had been removed. After referring to the earlier statutes and practice and coming to the Act of March 3, 1887, this Court said (p. 454):

"In terms it only abolishes appeals and writs of error, it is true, and does not mention writs of mandamus; and it is unquestionably a general rule, that the abrogation of one remedy does not affect another. But in this case, we think it was the intention of Congress to make the judgment of the Circuit Court remanding a cause to the state court final and conclusive. The general object of the act is to contract the jurisdiction of the federal courts. The abrogation of the writ of error and appeal would have had little effect in putting an end to the question of removal, if the writ of mandamus could still have been sued out in this court. It is true that the general supervisory power of this court over inferior jurisdictions is of great moment in a public point of view, and should not, upon light grounds, be deemed to be taken away in any case. Still, although the writ of mandamus is not mentioned in the section, yet the use of the words 'such remand shall be immediately carried into execution,' in addition to the prohibition of appeal and writ of error, is strongly indicative of

[30]

an intent to suppress further prolongation of the controversy by whatever process. We are, therefore, of opinion that the act has the effect of taking away the remedy by mandamus as well as that of appeal and writ of error.'

"The provisions in the Act of 1887 on which that decision and others to the same effect were based are still in force as parts of Sections 71 and 80, Title 28, U. S. Code. They are in *pari materia*, are to be con-

strued accordingly rather than as distinct enactments, and, when so construed, show, as was held in *Morey v. Lockhart*, 123 U. S. 56, 58, that they are intended to reach and include all cases removed from a state court into a federal court and remanded by the latter.

"It follows that the remanding order of the district court was not subject to reexamination by the circuit court of appeals on the petition for mandamus."

The Bryant case is followed by all of the later Federal decisions, and was especially controlling in *In re: Satterley* (102 F. (2d) 144, C. C. A., 5th Circuit, March 3, 1939), in which case an application had been made for leave to file a petition for writs of mandamus, prohibition, certiorari and injunction, and the Circuit Court of Appeals held that the judgment of the Federal District Judge that the case was not a proper one for removal, was "not reviewable in this Court by any form of procedure (citing *Employers Reinsurance Corporation vs. Bryant*). This Court being without jurisdiction, to review the order of remand, the petition is denied."

[31]

10. The Order of the Federal District Court remanding the cause back to the State Court could not be attacked directly, indirectly, or collaterally.

We feel that the above proposition is pertinent to the issues now before the Court for the reasons, as stated before, it is apparent from Garnishee's Application that it is attempting to attack the Order of Remand made over a year ago by the Federal District Court.

In *Yankaus vs. Feltenstein* (244 U. S. 127), a judgment was entered in favor of the Plaintiff and against the Defendant by the City Court of the City of New York during the interval in which Appellant claimed that the Federal District Court had exclusive jurisdiction of the cause because of the removal proceeding the Appellant

had undertaken. After the cause was remanded to the State Court, the Appellant and Defendant moved in the City Court to set aside the judgment rendered while it was alleged the suit was pending in the United States District Court, which motion was denied. Appellant then appealed to the New York Supreme Court, appellate term, which Court affirmed the lower Court. Appellant then appealed to the United States Supreme Court, and this Court held:

“As we view this case, we think the judgment of the court below must be affirmed, as this proceeding is practically an attempt to review an order remanding a cause attempted to be removed to the District Court of the United States. Section 28 of the Judicial Code provides that ‘whenever any cause shall be removed from any State court into any district court of the United States, and the district court shall decide that the cause was improperly removed, and order the same to be remanded to the state court from whence it came,

[32]

such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the district court so remanding such cause shall be allowed.’ ”

“For the reasons stated, the case was remanded to the City Court. We think these orders, with the accompanying memoranda and opinion, taken together, show that the District Court denied its jurisdiction, and remanded the cause to the City Court. In this attitude of the case, the judgment of the state court must stand, as the effect of the orders of the District Court was to hold the attempted removal unauthorized. This court has more than once held that such an order is not subject to review; directly or indirectly, but is final and conclusive. *Missouri Pacific Ry. Co. v. Fitzgerald*, 160 U. S. 556, 580-583; *McLaughlin Brothers v. Hallowell*, 228 U. S. 278, 286; *Pacific Live Stock Co. v. Oregon Water Board*, 241 U. S. 440, 447.”

“It follows that the judgment of the City Court of the City of New York must be affirmed.”

In *Chicago, St. Paul, Minneapolis & Omaha Railway Company v. Hensley* (25 F. (2d) Page 861), (see facts as set forth in discussion of cause under Proposition 9), the Court refused to grant the relief prayed for in the ancillary petition filed in equity for a permanent injunction, because the decision and decree of the court below to remand the case “is not reviewable by this court by means of the ancillary suit in equity in this case.” *McCabe v. Guaranty Trust Co.* (C. C. A.) 243 F. 845, 847, 849; *Mestre, Atty. Gen., v. Russell & Co.* (C. C. A.) 279 F. 44, 46; *Dillinger v. Chicago, B. & Q. R. Co.*, (C. C. A.) 19 F. (2d) 196; *Aldredge v. B. & O. R. Co.* (C. C. A.) 20 F. (2d) 655.

[33]

Likewise, the Court in *Moffet et al. v. Robbins*, (14 Fed. Supp. 602, D. C., Kan. September 4, 1935) held that an order of the Federal District Court remanding the cause to the State Court was not reviewable in a subsequent suit to enjoin enforcement of the judgment rendered in the State Court. In other words the Court held that there could not be any collateral attack, and that the matters sought to be reviewed in the collateral proceedings, were res judicata. We quote from the opinion:

“Complaint is made of an order of Judge Pollick remanding the cause complained of to the District Court of Harper County, Kan. The remanding order was final and cannot be brought here indirectly for review. *City of Waco, Tex., v. United States F. & G. Co.*, 67 F. (2d) 785, 786 (C. C. A. 5).

“I am of the opinion the Plaintiff has had her day in Court and issues as presented in her bill are now res judicata. *Coleman v. Apple*, 298 F. 718, 720, 721 (C. C. A. 8); *United States v. Throckmorton*, 98 U. S. 61, 25 L. Ed. 93.”

The *Moffet* case was appealed to the Circuit Court of

Appeals (281 F. (2d) 431) which affirmed the lower Court, and the Circuit Court of Appeals' decision was in turn appealed to the United States Supreme Court which denied a writ of certiorari on May 18, 1936 (See 56 S. Ct. 940, 298 U. S., 675, 80 L. Ed. 1397).

The proposition of law above stated by Plaintiff, is substantiated by the authorities cited in 114 *A. L. R.* at page 1484, in which the compilers state the rule to be as follows:

"Failure has uniformly met attempts to obtain appellate consideration of an inferior Federal

[34]

Court's order remanding a cause to the State Court, where such attempts have taken the form of appeals from or writs of error to the lower court to review its decision as to a matter dependent upon the order of remand."

The annotation commencing with page 1484 gives the various authorities sustaining this rule of law.

11. The Garnishee Defendant never asserted its attempt to remove said cause in good faith, and is not acting in good faith in its application for a re-hearing.

A. In their Application, counsel for Garnishee rather flourishingly use the words "good faith" and indicate same was a controlling factor in all their acts and conduct. We have no choice but to call their attention to their utter lack of good faith shown by them throughout this proceeding, and especially as shown by the record (See pages 98-104, 105, 106, 108, 109-117).

B. Counsel for Garnishee again speaks of "an attorney who believes he has a removable cause" (Page 14 of Application) and who asserts "in good faith that the right to remove the cause existed" (Page 15 of Application). In reply to such contention we can only refer counsel for Garnishee to Exhibit C which they attached in Garnishee Defendant and Appellant's Answer to Plain-

tiff and Appellee's Motion to Dismiss on file in this Court, in which Exhibit, on April 15, 1939, Attorney H. Monroe Stanton wrote to Frederick J. Ward, said Garnishee's co-counsel, as follows:

[35]

"In re: 74013. — Stevens v. Northway, et al.

Dear Mr. Ward:

"The motion to remand was argued before Judge Tuttle, and he followed about the same line of reasoning THAT I THOUGHT HE WOULD IN THIS CASE (our Caps) * * * However, after the other attorneys argued * * * he decided to remand the case, basing his decision on the case of BRUCKER V. GEORGIA CASUALTY COMPANY and RUSSELL V. GENERAL ACCIDENT, *with which you are familiar* (Our italics) * * *"

How can counsel for Garnishee claim that they acted in good faith when one of their counsel admits himself that the Federal District Judge "followed about the same line of reasoning that I thought he would in this case." It is very evident that the attorney for Garnishee, having read the authorities above mentioned before such attempted removal, well knew that in view of such authorities, the Federal District Judge would do just what he "thought he would in this case." And as to the other co-counsel for Garnishee, it is very evident that he was "familiar" with these cases.

C. Also having in mind the foregoing letter, we believe we are justified in saying that the claims, now being made by counsel for Garnishee in their new appeal under their Application, that this Court in effect reverse the decision of the Federal District Judge on the question of remand, are not being made in good faith because of the further statements made by Attorney Stanton to Attorney Ward in said letter, as follows:

"But he (Judge Tuttle) said that this was an ancillary proceeding, and if he was to allow the

[36]

transfer, it would promote considerable confusion, and *he analyzed the question very carefully.*"

"In my opinion, we would get nowhere appealing from this decision, and we may as well handle it in the State Court, having in mind that we will probably get beat before Judge Hart and have to appeal the case."

* * *

Yours very truly,
H. Monroe Stanton."

D. Furthermore, the contention made by counsel for Garnishee that they are acting in good faith in this Application is negatived very definitely by a certain letter or communication written since the decision of this Court rendered on April 1, 1940, in which communication counsel for Garnishee communicated with counsel for Plaintiff on April 10, 1940, and in which communication said Garnishee, through its counsel, agreed to pay said judgment "immediately." We at first questioned the propriety of submitting this letter as a part of this Brief, but in view of the various claims of good faith on the part of counsel for Garnishee, we believe such communication is relevant to show merely another instance, in a long course of conduct on the part of counsel for Garnishee, which discloses an utter lack of good faith on their part. In this letter, the full context of which is disclosed as Exhibit 1 at the end of this Brief, Counsel Frederick J. Ward wrote to counsel for Plaintiff as follows:

"If you will kindly let me have a statement as to the amount due in this case, I will arrange to see that it is taken care of immediately."

[37]

Mr. Ward was and is the attorney of record for said Garnishee Defendant, and an examination of the various affidavits executed by him in the Record and elsewhere, definitely shows that he was and is authorized to act on

behalf of the 'Garnishee Defendant. We mention this to circumvent any claim on the part of the Garnishee itself that Attorney Ward was not authorized to communicate as he did.

12. All the questions presented in the Garnishee Defendant's application for a re-hearing were fully argued and considered by the Supreme Court in its former hearing.

The Garnishee is now asking this Court to reverse its former action in which it affirmed the judgment of the lower court. However, Garnishee's Application and Brief for Re-hearing states no new points or authorities in support thereof, and presents no questions not already submitted, fully considered and decided upon in the previous hearing of this cause.

It is well settled that a re-hearing will not be granted unless it is shown either that some question decisive of the case and duly submitted by counsel has been overlooked, or that the Court has based its decision on the wrong principle of law. A cause of action must be shown, that is, it must appear that the judgment was erroneous and the Court must be satisfied that it made a mistake of law or misunderstood the facts. It is with these rules in mind that, despite the numerous and decisive authorities cited by Plaintiff in his original brief, Plaintiff has nevertheless again cited numerous and controlling authorities in this Brief. A cursory reading of the Supreme Court's opinion just rendered,

[38]

immediately discloses that the learned Judge who wrote the opinion was not only very familiar with the facts, but was also especially familiar with the various dates involved in the case.

It is also a well settled principle of law that a re-hearing will be denied where the questions presented by the Petition or Application were fully argued and considered by the Court in the former hearing. And we

also understand it to be a well settled principle of law that a re-hearing will not be granted merely for the purpose of re-arguing a case on points already considered and determined, unless some new and decisive authority has been discovered which was overlooked by the Court. Neither will a re-hearing be granted when in deciding the case the Court had considered the questions raised, although all of them may not have been discussed in the opinion. And neither will a re-hearing be granted to consider questions or points of law not previously raised in the former proceedings.

This Court is very familiar with the various cases and authorities substantiating the above rules of law, and therefore we do not quote verbatim from them, but we do cite the following cases and authorities in support of the foregoing propositions.

Hutchins v. Kimmell, 31 Mich. 126;
Thompson v. Jarvis, 40 Mich. 526;
Kraft v. Raths, 45 Mich. 20;
MacLean v. Scripps, 52 Mich. 214;
Nichols, Shepard & Co. v. Marsh, 62 Mich. 439;
Gaskill v. Weeks, 156 Mich. 668;
Spitzley v. Garrison, 208 Mich. 50;
 4 *Corpus Juris*, 624;
 3 *Am. Juris Prudence*, 346, 347;

[39]

Taylor v. Boardman, 24 Mich. 287, 302;
Seymour v. Detroit C. & B. Rolling Mills, 56 Mich. 117, 123;
Badger v. Boyd, 65 S. W. (2d) 601;
Louisville R. R. v. U. S. Fidelity Co., (Tenn.) 148 S. W. 671;
Hollowbush v. McConnel, 12 Ill. 203;
Blatchford v. Newberry, 106 Ill. 584, 592;
Parker v. State, (Ind.) 33 N. E. 119;
Stacy v. Glen Ellyn Hotel & Springs Co. (Ill.) 79 N. E. 133;
Sioux City & St. Paul R. Co. v. U. S., 160 U. S. 686 — 40 L. Ed. 583;

Buck Owens, et al. v. Hagenbeck Wallace Shows Co. (192 A. 158, 464, Rhode Island, 1937).

13. The State Supreme Court will not review an application for re-hearing, questions which were not presented to it by the Appellant in its original appeal, and neither will the Federal Courts, including the United States Supreme Court, review any claimed constitutional questions where they were urged for the first time upon petition for a re-hearing.

A. Up to the time of the filing of its Application for re-hearing, Garnishee Defendant had never claimed that the due process clause under the Federal Constitution, had been violated. At no time during any of the proceedings in the trial Court was any such claim made. We have carefully re-read the various reasons set forth by Garnishee in its Special Appearance and Motion to Set Aside Default (Record, p. 72-75) and likewise carefully re-read Garnishee's Assignments of Error and Reasons and Grounds for Appeal, and likewise

[40]

carefully re-read Garnishee's original law brief filed in this Court — and nowhere, in any of said pleadings, nor in any other pleadings, or papers executed by Garnishee or on its behalf, was any claim ever made that the due process clause of the Federal Constitution had been violated.

We also call this Court's attention to the oral arguments made by counsel for Garnishee at the time this cause was argued before this Court and point out that at no time during such arguments was any claim made by Garnishee's counsel that the Fourteenth Amendment had been violated. It is only now, for the first time, that such issue is attempted to be injected into this cause, with an apparent intent to confuse the issues before this Court.

As early as 1869, this Court decided that a petition for re-hearing, on a question not presented by the plead-

ings and not passed upon by the trial Court nor on the former hearing, will be denied. *Ryerson v. Eldred*, 18 Mich. 49.

We again submit that at no time prior to this new Application by the Garnishee, was the law in question ever mentioned by the Garnishee Defendant or its counsel. In a very recent decision, this Court has held that a re-hearing will not be granted where the statute which is claimed to be controlling was not called to the Court's attention, involved in issue, nor passed on. *Wilcox v. Board of Commissioners of Sinking Fund of City of Detroit*, (262 Mich. 699), re-hearing denied.

Also see *Blankenship vs. Blankenship* (276 Pac. 9, Nevada, 1929), which is also reported in 63 A. L. R. 1127, at Page 1131, wherein the Court held:

[41]

"This Court has repeatedly held that a point raised for the first time on a petition for re-hearing will not be considered. *Beck v. Thompson*, 22 Nev. 419, 41 Pac. 1; *Kirman v. Johnson*, 30 Nev. 146, 93 Pac. 500, 96 Pac. 1057; *Gamble v. Hanchett*, 35 Nev. 319, 133 Pac. 936; *Nelson v. Smith*, 42 Nev. 302, 320, 176 Pac. 261, 178 Pac. 625; *Re Forney*, 43 Nev. 227, 242, 24 A. L. R. 553, 184 Pac. 206, 186 Pac. 678; *Pedroli v. Scott*, 47 Nev. 313, 31 A. L. R. 841, 221 Pac. 241, 224 Pac. 807. A departure from this well-established rule is not advisable."

To the same effect is *Shea vs. Pilette* (189 A. 154, Vermont, 1937), which case is also reported in 109 A. L. A. 933.

And likewise the Indiana Supreme Court has held that a question of res judicata will be deemed waived where not presented in the original brief on appeal, and will not be considered where first presented upon a petition for re-hearing. *Hutchinson vs. Arnt* (1 N. E. (2d) 585, 4 N. E. (2d) 202, Indiana, 1936), which case is also reported in 108 A. L. R. 530.

B. Likewise, the Federal Courts, including the Supreme Court of the United States, will refuse to review a case where a so-called federal question is injected into the case in the State Court for the first time on the Appellant's Application for a re-hearing.

A very clear and concise decision on this question, which is also pertinent to some of the other aspects of the case at bar, was written by the very able scholar Justice Brandeis, in *American Surety Company, Plff. in certiorari v. Vivian F. Baldwin, et al, Vivian F. Baldwin, et al, v. American Surety Company* (287 U. S. 156, 77 L. Ed. 231, 53 S. Ct. 98, November 14, 1932), which is also reported in 86 A. L. R. 298. These two

[42]

cases were consolidated in the Supreme Court because they both arose out of the same set of facts. In each case the *American Surety Company* sought to be relieved from a judgment of \$22,357.21 in the one case and from a judgment for a smaller amount in the other case. In each case the Appellant Surety Company claimed that the judgment was void under the due process clause of the Fourteenth Amendment. The Court stated:

"First. The certiorari granted in No. 3 to review the judgment rendered by the Supreme Court of Idaho on May 2, 1931, must be dismissed for failure to make seasonably the Federal claim. * * * The Baldwins appealed to the Supreme Court of Idaho; and upon the presentation of their appeal no federal question was raised by either party."

* * *

"The Surety Company petitioned for a re-hearing. In that petition, besides reiterating several of its previous contentions, it urged, for the first time, that the rendition of the judgment on its undertaking violated the due process clause of the Fourteenth Amendment. The petition was denied without opinion. The federal claim there made cannot serve as the basis for review by this Court. The contention that a federal right had been violated rests on the

action of the trial court in entering judgment without giving notice and an opportunity to be heard. The same ground of objection had been raised throughout the proceedings but solely as a matter of state law. There had been ample opportunity earlier to present the objection as one arising under the Fourteenth Amendment. (Citations).

* * *

"Second. In No. 21, the Circuit Court of Appeals should have affirmed the decree of the Federal Court for Idaho which denied the Surety Company's application for an interlocutory injunction

[43]

and dismissed the bill. *For the federal remedy was barred by the proceedings taken in the State Court which ripened into a final judgment constituting res judicata.*"

* * *

"The full faith and credit clause, together with the legislation pursuant thereto, applies to judicial proceedings of a State Court drawn in question in an independent proceeding in the Federal Courts. (Citations). The principles of res judicata apply to questions of jurisdiction as well as to other issues. (Citations). They are given effect even where the proceeding in the Federal Court is to enjoin the enforcement of a state judgment, if the issue was made and open to litigation in the original action, or was determined in an independent proceeding in the State Courts. (Citations). The principles of res judicata may apply, although the proceeding was begun by motion. Thus, a decision in a proceeding begun by motion to set aside a judgment for want of jurisdiction is, under Idaho law, res judicata, and precludes a suit to enjoin enforcement of the judgment. (Citations). Since the decision would formally constitute *res judicata* in the courts of the state; since it in fact satisfies the requirements of prior adjudication; and since the constitutional issue as to jurisdiction might have been presented to the State Supreme Court and

reviewed here, the decision is a bar to the present suit insofar as it seeks to enjoin the enforcement of the judgment for want of jurisdiction." (Citations).

* * *

"The opportunity afforded by state practice was lost because the Surety Company inadvertently pursued the wrong procedure in the State Courts. Instead of moving to vacate, it should have appealed directly to the State Supreme Court. When later it pursued the proper course the time for appealing had elapsed. The fact that its opportunity

[44]

for a hearing was lost because misapprehension as to the appropriate remedy was not removed by judicial decision until it was too late to rectify the error does not furnish the basis for a claim that due process of law has been denied. (Citations). Having invoked the state procedure which afforded the opportunity of raising the issue of lack of notice, the Surety Company cannot utilize the same issue as a basis for relief in the Federal Court. Federal claims are not to be prosecuted piecemeal in State and Federal Courts, whether the attempt to do so springs from a failure seasonably to adduce relevant facts, as in (Citations) or from a failure seasonably to pursue the appropriate state remedy.

* * *

"Petition for rehearing denied January 9, 1933."

In 87 A. L. R. at Page 307, will be found a footnote with innumerable authorities sustaining the proposition that failure to comply with state rules of practice prevents the United States Supreme Court from considering a federal claim on direct review.

CONCLUSION

In conclusion, Plaintiff contends that this Court has correctly decided the case at bar and that therefore Garnishee's Application for a re-hearing should be denied.

As herein stated, it is Plaintiff's position that the State Court had the right to pass upon the sufficiency of the Petition for Removal presented to it at the time the Garnishee Defendant sought an order from the State Court to remove said cause to the Federal District Court; that, even assuming, but only for the purpose of argument, that the State Court had no right

[45]

to pass upon the sufficiency of the Petition for Removal presented to it, and that, as Garnishee contends, such presentation was in the nature merely of a formality, Plaintiff still shows unto this Court that the Federal District Court, under the United States Code, still had the right to pass upon the motion made in Federal Court to remand said cause back to the State Court.

That the action of garnishment under the Michigan statutes, and under the decisions, not only of the Michigan Supreme Court, but also the United States Supreme Courts, interpreting state garnishment statutes, is an ancillary proceeding and a proceeding inseparable from the principal suit, and not an independent suit; that the Federal Courts are bound by the construction given state statutes, including garnishment statutes, by the State Courts, and the Federal Courts, including the United States Supreme Court, respect the decisions of the State Courts interpreting their own state statutes; that the order of the United States Federal District Court, for the Eastern District of Michigan, Northern Division, remanding the cause back to the State Court, was binding upon the State Courts and could not be reviewed by them; that in the event a cause is removed from a State Court to a Federal Court and thereafter remanded to the State Court, the Federal Court acquired no jurisdiction further than that necessary to remand said cause, and any other

action taken in the interim, by either the Federal Court or the parties, is void.

That on the attempted removal of the cause to a Federal Court, if it afterwards appears that the cause was not a proper one for removal, and is remanded by the Federal Court, any action of the State Court made in the interval between such attempted removal and such

[46]

actual remand, is valid and binding upon all the parties; that, even assuming, but only for the purpose of argument, that acts of the State Court in the interval between the attempted removal and the actual remand, are not valid, then nevertheless there were valid acts done in the State Court and by the State Court after remand to substantiate the judgment which was entered in this cause against the Garnishee Defendant; that the order of the Federal District Court remanding the cause back to the State Court is final and unappealable; and will not be reviewed by any other Court; that the order of the Federal District Court remanding the cause back to the State Court cannot be attacked directly or collaterally.

That the Garnishee Defendant herein never asserted its attempt to remove said cause in good faith, and, as clearly shown by its acts and conduct, is not acting in good faith in its Application for a re-hearing; that all of the questions presented in the Garnishee Defendant's Application for a re-hearing were fully argued and considered by the Supreme Court in its former hearing; that the State Supreme Court will not review on Application for a re-hearing, questions which were not presented to it by the Appellant in its original appeal, and likewise, neither will the Federal Courts, including the United States Supreme Court, review any claimed constitutional questions where they are injected or were urged for the first time upon the Petition for a re-hearing.

Wherefore, Plaintiff herein respectfully submits that

the Application for a re-hearing made by the Garnishee herein, should be denied.

Respectfully submitted,

B. A. WENDROW,
WORCESTER & WORCESTER.

[47]

LAWLEY et al. v. WHITEIS et al. (AMERICAN
SURETY CO. OF NEW YORK, (Garnishee)
No. 2701

(24 Fed. Supp. Page 698)

District Court, N. D. Oklahoma
Sept. 28, 1938

“FRANKLIN E. KENNAMER, District Judge.

Margaret Lawley, the mother, and as Administratrix of the estate of W. E. Lawley, deceased, recovered a judgment in ~~the~~ District Court of Tulsa County, against Bert Whiteis and L. Sevy, for the wrongful death of a son, caused by an automobile accident. After the rendition of judgment for the plaintiffs, an execution was issued and was returned no property found. Thereafter, garnishment summons was issued under Sections 863 and 864, of Title 12, Okl. St. Ann., Sections 500 and 501, O. S. 1931, against the American Surety Company of New York, seeking to subject to the payment of the judgment an amount claimed to be due to the defendant under a policy of liability insurance alleged to have been issued by the garnishee to the defendant prior to the time of the fatal accident. Interrogatories were submitted along with the garnishment summons, as provided by the Oklahoma Statute.

The garnishee filed its answer denying that it was indebted to the defendant, and further denying that it had ever written any insurance policy covering the defendants, and alleging that the defendant, Bert Whiteis, the owner of the truck involved in the accident was a carrier for hire under the laws of the State of Okla-

homa, and required by such law to obtain a permit from the Corporation Commission of the State of Oklahoma,

[48]

which he had neglected to do, and was therefore engaged in the business of hauling for hire, in violation of the law. The garnishee further alleged that it was prohibited by law from issuing casualty insurance to any person engaged in a like business, because the garnishee had never qualified under the laws of the State of Oklahoma and the rules and orders of the Corporation Commission to issue casualty insurance covering vehicles hauling for hire. The plaintiff filed notice of election to take issue with the answer of the garnishee, and the garnishee, within the time provided by law, filed its petition and bond for removal, and an order removing the cause to this court was duly entered. The matter comes on for hearing upon plaintiff's motion to remand.

Plaintiff and defendants are residents of the State of Oklahoma, and the garnishee, the American Surety Company of New York, is a non-resident of Oklahoma, being a corporation organized under the laws of the State of New York. The judgment obtained against the defendants was in the amount of \$4,000, plus interest and costs. The only question presented is whether the garnishment proceedings against the American Surety Company is a suit of a civil nature between citizens of different states and which can be fully determined as between them, within the purview of the removal statutes. If the garnishment proceedings instituted in this case are merely ancillary or supplemental proceedings to the suit in the State Court and the judgment rendered therein, then the same is not removable to this Court. On the other hand, if such proceedings are independent suits, then they are probably removable.

[49]

The question presented here has had the consideration of the United States District Court for the Western District of Oklahoma, and has also been considered by

this court. See *Reed v. Bloom*, D. C., 15 F. Supp. 7; *Luhman v. Supernaw et al.*, D. C., 47 F. 2d 610.

Honorable Edgar S. Vaught, Judge of the District Court for the Western District of Oklahoma, concluded that such proceedings were removable. The contrary result was reached in this court. The contrary ruling of Judge Vaught has compelled a careful reconsideration of the removability of such proceedings, with the result that the question has been carefully investigated as if it were a new one for this jurisdiction. While the decision in the case is not free from doubt, and is not a question easy of determination, still, in view of the construction placed upon the Statutes of Oklahoma by the highest court of this State, construing the nature of the proceedings, it must be concluded that garnishment proceedings under the particular Statutes noted above, are auxiliary and ancillary to the suit resulting in judgment, under which such proceedings are authorized.

(1) The difficulty involved in determining the removability of such proceedings lies in determining the character of the garnishment proceedings. If, under the Statutes of Oklahoma, garnishment does not partake of the nature of an independent suit, or litigation, but is merely auxiliary to the main action, or supplemental to it, and a means of securing a satisfaction of judgment rendered therein, it is not removable. *Pratt v. Albright*, C. C., 9 F. 634. On the other hand, if such proceedings are independent suits, they may be removed.

[50]

The Statutes of Oklahoma provide for garnishment proceedings before as well as after judgment. The Statutes referred to above are applicable to proceedings after judgment has been obtained. The proceedings prescribed therein differ from proceedings prior to the entry of judgment, and the Statute under which garnishment proceedings were instituted herein are authorized by the statute in aid of execution only after execution has been returned unsatisfied. They are found in and constitute a part of the chapter of the Oklahoma Statutes on

"Executions and Other Proceedings To Enforce Judgments." Garnishment proceedings are also authorized by Sections 497, 484, 495 and 498, O. S. 131, being Sections 847, 848, 861 and 850, of Title 12, Okl. St. Ann. These provisions are not applicable to the instant case, because the procedure involved herein was instituted under the authority of the Sections of the Statute first referred to.

The Supreme Court of Oklahoma has determined that garnishment after judgment is practically an equitable execution brought for the purpose of reaching nonleviable assets and is a means provided for obtaining satisfaction of a judgment of a creditor out of the property of the debtor. See *First National Bank of Cordell vs. City Guaranty Bank of Hobart*, 174 Okl. 545; 51 P. 2d 573; *Davidson vs. Finley*, 96 Okl. 291, 222 P. 678. It is thus well established that the proceedings in garnishment after judgment, is auxiliary to the main case and is only a means provided for obtaining satisfaction of a judgment. *It has been construed by the Supreme Court of Oklahoma to partake of an equitable execution. The construction of the Statutes of Oklahoma governing garnishment proceedings after judgment, is binding upon this court. Erie R. Co. vs. Tomp-*

[51]

kins, 304 U. S. 64, 58 S. Ct. 817 82 L. Ed. 1188, 114 A. L. R. 1487; *Ruhlin vs. New York Life Insurance Company*, 304 U. S. 202, 58 S. Ct. 860, 82 L. Ed. 1290.

Under the Oklahoma Statutes, after answer has been filed by the garnishee and notice of election to take issue is filed by the Plaintiff, the issue shall stand for trial as a civil action, in which the affidavit on the part of the Plaintiff shall be deemed the petition and the garnishee's affidavit the answer thereto. Sec. 620, O. S. 1931, Sec. 1177, Title 12, Okl. St. Ann. In Sec. 625, O. S. 1931, Sec. 1182, Title 12, Okl. St. Ann., it is provided that the proceedings against a garnishee shall be deemed an action by the plaintiff against the garnishee and defendant, as parties defendant. *The above statutory provisions appear under the chapters on "Attachment and Garnish-*

ment", while the provisions of the Statute under which proceedings were undertaken in this case, are a portion of the chapter of the Oklahoma Statutes under "Execution". Attachment and garnishment proceedings may be independent proceedings under certain provisions of the Oklahoma Statutes, but such proceedings may also be in aid of execution, or ancillary to the main suit and the judgment rendered therein. The proceedings in this case were pursuant to the statutory provisions governing executions, and therefore did not constitute an independent controversy.

(2) It is well settled that a State cannot prevent the removal of actions from its courts to the Federal Court by statutory enactment. See *Terral v. Burke Construction Co.*, 257 U.S. 529, 42 S. Ct. 188, 66 L. Ed. 352, 21 A. L. R. 186; *Donald v. Philadelphia Co. et al.*, 241 U. S. 329, 36 S. Ct. 563, 60 L. Ed. 1027. No attempt has been made in the instant case to prevent a removal

[52]

by a Statute, but the proceedings provided therein do not come within the removal act, because they are not independent proceedings or suits. Statutory proceedings for the taking of private property for public uses cannot deny a non-resident the right of removal when the other jurisdictional requirements are met (see *Pacific Railroad Removal Cases*, 115 U. S. 1, 5 S. Ct. 1113, 29 L. Ed. 319), but such proceedings are independent actions.

(3) It is contended by the garnishee that garnishment proceedings in Oklahoma are independent proceedings, and they urge in support of their argument the requirement that a motion for new trial be filed before the judgment rendered in such proceedings will be reviewed by the Supreme Court of Oklahoma, citing *Cassidy v. Thompson*, 84 Okl. 33, 202 P. 201; *Brooks v. Fields*, 25 Okl. 427, 106 P. 828. The latest case of the Oklahoma Supreme Court requiring the filing of motion for new trial is *Dawson Produce Co. v. Cohn*, 172 Okl. 28, 44 P. 2d 1034. The requirement of the filing of motion for new trial in order to obtain a review in the Supreme

Court, is not controlling of the question. There may be various questions involved in the same suit, and if such questions are ancillary to the main controversy, the same does not constitute an independent suit, despite the fact that the litigants in the ancillary proceedings are required to file motions for new trial in order to obtain a review by the Supreme Court of Oklahoma of the questions involved.

Since the rendition of the decisions in *Erie R. Co. vs. Tompkins*, supra, and *Ruhlin vs. New York Life Ins. Co.*, supra, this Court is bound by the construction placed upon garnishment proceedings similar to those involved here, by the Oklahoma Supreme Court, rather

[53].

than expressions from other Federal Courts with respect to garnishments, even if under Statutes similar to Oklahoma's, are not controlling. However, no Federal case has been cited which involves Statutes identical with the provisions of the Oklahoma Code.

(4) In *Reed vs. Bloom*, supra, the court refers to certain statutory provisions of Oklahoma with respect to the necessity of filing public liability policies as a condition to obtaining certificates of convenience and necessity for motor carriers. The Statute, as construed by the Supreme Court of Oklahoma, provides for joining the insurance carrier along with the insured as original parties defendant in cases of liability on account of accidents. *Enders vs. Longmire*, 179 Ok. 633, 67 P. 2d 12. The particular Statute is not involved in this case. The carrier in such cases is made a party defendant by reason of the Statute. In cases similar to the one here presented, there is no provision for joining the insurance carrier as a party defendant; such insurance company, if it has issued a policy indemnifying the assured against loss from liability for damages on account of injuries, etc., is subject to garnishment proceedings. *Maryland Casualty Co. v. Peppard*, 53 Okl. 515, 157 P. 106, L. R. A. 1916E, 597.

(5) As the proceedings in garnishment were instituted

in this case under the particular Statute, which proceedings have been construed to be practically an equitable execution brought for the purpose of reaching non-leviable assets, and is merely a means provided for obtaining satisfaction of a judgment, it is merely auxiliary and ancillary to the main suit and judgment, and does not constitute an independent action, and is therefore not removable.

The motion to remand is sustained."

[54]

EXHIBIT 1

FREDERICK J. WARD

Attorney and Counsellor at Law
Dime Building
Detroit, Mich.

Robert E. Plunkett
Dexter A. Clark
William H. Sheppard

April 10, 1940

Mr. B. A. Wendrow
Mt. Pleasant, Michigan
Commercial Block

Re: 74013 Stevens vs. Northway et al.

Dear Sir:

Beg to acknowledge receipt of your communication of April 9th, enclosing Bill of Costs, which I note you have set for taxation on the 15th.

If you will kindly let me have a statement as to the amount due in this case, I will arrange to see that it is taken care of immediately.

Yours very truly,

(Signed) F. J. Ward.
Frederick J. Ward.

FJW:MJA

STATE OF MICHIGAN,—ss.

In the Supreme Court
Clerk's Office

I, Jay Mertz, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the annexed and foregoing is a true and correct copy of the brief of plaintiff opposing motion for rehearing, filed in said Court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Supreme Court, at Lansing, this 26th day of September, A. D. 1940.

Jay Mertz,

(SEAL)

Clerk.

MOTION TO REMAND

UNITED STATES OF AMERICA
IN THE DISTRICT COURT OF THE UNITED
STATES FOR THE EASTERN DISTRICT
OF MICHIGAN, NORTHERN DIVISION

FRANK STEVENS,
Plaintiff,

vs.

R. A. NORTHWAY, doing business
under the assumed name of NORTHWAY
CLINIC AND HOSPITAL, R. A. NORTHWAY,
ROY B. FISHER,
Principal Defendants,

THE METROPOLITAN CASUALTY INSURANCE
COMPANY OF NEW YORK, a foreign
corporation,
Garnishee Defendant.

Now comes the above named R. A. Northway, doing business under the assumed name of Northway Clinic and Hospital, R. A. Northway and Roy B. Fisher, principal

defendants, by their attorneys, Crane & Crane, and appear specially for the purposes of this motion only, saving and reserving any and all objections which they or each of them have to the manifold imperfections in the mode, manner and method of the removal papers, and expressly denying that this Court has jurisdiction of this cause or of these defendants, respectfully moves the Court to remand this cause to the Court from which it was alleged to be removed, the Circuit Court for the County of Isabella, State of Michigan, for the reasons following:

1. That the controversy in this action and every issue of fact and law herein is not wholly between citizens of different states and cannot be fully determined as between them. The record in this cause shows that the plaintiff, Frank Stevens, is a resident of the County of Isabella, State of Michigan, and that the defendant, R. A. Northway, doing business under the assumed name of Northway Clinic and Hospital and R. A. Northway is a resident of the City of Mt. Pleasant, Isabella County, State of Michigan, and that the defendant Roy B. Fisher formerly was a resident of the City of Mt. Pleasant, Isabella County and State of Michigan, and now is a resident of the City of Midland, County of Midland and State of Michigan. Further that at the time of the commencement of said action the Circuit Court for the County of Isabella had unquestioned jurisdiction over all of the parties to this action and that this jurisdiction has continued and does now continue in executing and administering its own process. Further that the Garnishee Defendant, The Metropolitan Casualty and Insurance Company of New York has domesticated itself in the State of Michigan, has a license and is authorized to do business in the State of Michigan, has power to sue and be sued, has appointed a resident agent and for all the purposes of this action has submitted itself to the jurisdiction and laws of the State of Michigan and is amenable to process issued by the Circuit Court for the County of Isabella, State of Michigan.

2. That the principal defendants in this action are necessary parties to the determination of the issues be-

tween the plaintiff and the garnishee defendant and that said defendants are necessary and indispensable parties to this action and that the issues and controversies involved herein are not separable.

3. That the Writ of Garnishment heretofore issued by the Circuit Court for the County of Isabella, State of Michigan, is ancillary and in aid of the main case heretofore instituted and adjudicated in the Circuit Court for the County of Isabella, State of Michigan, and is substantially an aid of the Court by way of execution in reaching non-leviable assets of the principal defendants.

4. That there is no dispute or controversy as to the fact or construction of the constitution or laws of the United States involved in said action.

5. That on April 4, A. D. 1939, the Honorable Ray Hart, Circuit Judge for the County of Isabella, State of Michigan, did deny the Petition of the garnishee defendant for the removal of said cause as should appear by the record.

WHEREFORE, said principal defendants therefore pray that this Honorable Court enter an Order that this cause is improperly removed and order the same to be remanded to the Circuit Court for the County of Isabella, State of Michigan, from whence it came, and that such remand shall be immediately carried into execution.

Crane & Crane,
William E. Crane,

Attorneys for R. A. Northway,
doing business as Northway
Clinic and Hospital, R. A.
Northway and Roy B.
Fisher.

Business Address:
308-309 Second National Bank
Building,
Saginaw, Michigan.

Dated: April 11, 1939.

STATE OF MICHIGAN

ss.

COUNTY OF SAGINAW

WILLIAM E. CRANE being duly sworn deposes and states that he is one of the members of the firm of Crane and Crane, attorneys, of Saginaw, Michigan, and that he is licensed to practice law in the State of Michigan and admitted to practice law in the State of Michigan and in the District Court of the United States for the Eastern District of Michigan, Northern Division.

Deponent states that R. A. Northway and Roy B. Fisher are clients of the firm of Crane & Crane and that he personally knows that said R. A. Northway is a citizen of the United States and of the State of Michigan and resides at Mt. Pleasant, Michigan.

Deponent further states that Roy B. Fisher is a citizen of the United States and of the State of Michigan, and resides in the City of Midland, County of Midland, Michigan.

Further Deponent states not.

William E. Crane.

Subscribed and sworn to before me, a Notary Public in and for said County, this 11th day of April, A. D. 1939.

Gertrude L. Smalling,
Notary Public, Saginaw County, Michigan.
My commission expires March 22, 1940.

United States of America

ss:

Eastern District of Michigan

I, George M. Read, Clerk of the United States District Court in and for the Eastern District of Michigan, do hereby certify that the annexed and foregoing is a true and full copy of the original Motion to Remand now remaining among the records of the said Court in my office.

(SEAL)

IN TESTIMONY WHEREOF, I have here-
unto subscribed my name and affixed the seal
of the aforesaid Court at Bay City this 25th
day of September, A. D. 1940.

George M. Read,
Clerk.

By Ethel Fletcher,
Deputy Clerk.

BLANK PAGE

SUPREME COURT OF THE UNITED STATES.

No. 425.—OCTOBER TERM, 1940.

Metropolitan Casualty Insurance Co.,	} On Writ of Certiorari to
Petitioner,	
vs.	
Frank Stevens, Respondent.	the Supreme Court of the State of Michigan.

[March 17, 1941.]

Mr. Justice MURPHY delivered the opinion of the Court.

We are asked in effect to hold invalid a default judgment entered by a state court in a garnishment proceeding after it had denied a petition for removal to a federal district court. The principal questions are whether we may review an order of the federal district court remanding the suit to the court from which it was removed, and whether the latter court was free to disregard a disclosure filed in the federal court before the default judgment was entered. From the record the following appears.

On March 8, 1939, respondent obtained a writ of garnishment from a Michigan state court requiring petitioner to appear on or before March 31 and disclose whether it was liable to individuals against whom respondent had recovered a judgment. On March 28, petitioner filed an application and bond in the state court for removal of the proceeding to the proper federal district court. On April 4, the state court denied the application. On April 10, petitioner filed in the federal district court copies of all papers on record in the state court and its disclosure denying any liability to respondent or to the judgment debtors. The next day, respondent entered petitioner's default in the state court for failure to appear, and notified petitioner that respondent would move for judgment on April 17.

On April 15, petitioner notified respondent of its attempt to remove the suit notwithstanding the ruling of the state court. Respondent promptly moved to have the proceeding remanded, and on the same day the district judge granted the motion. The remand order was filed in the state court on April 17. Respondent thereupon entered petitioner's default a second time, introduced evidence, and obtained a default judgment. On April 18, petitioner unsuccessfully moved to vacate the judgment. Appeal to the Michigan Supreme Court followed and the judgment was affirmed. 293

Mich. 31. Because it involved important questions concerning the removal statute (28 U. S. C. § 71), we brought the case here. 311 U. S. —.

Petitioner contends that the garnishment proceeding was removable as a separable controversy and that the state court therefore was without jurisdiction to enter the default judgment. Further, petitioner contends in substance that the petition for removal when filed in the state court deprived that court of power to proceed with the cause, at least until the federal court had passed upon the question of removability, and that in all events the refusal of the state court to accord any legal effect to the disclosure filed in the federal district court while the petition for removal was pending there was a denial of a federal right given by the removal statute, *supra*. We cannot agree.

The case is ruled by *Yankaus v. Feltenstein*, 244 U. S. 127.¹ There we held that an order of a federal district court remanding the cause to the state court was not reviewable directly or indirectly, and affirmed the judgment of the state court even though it had been secured by default.² While the opinion does not expressly consider the effect of a petition for removal on subsequent proceedings in the state court, the clear import of the decision is that the proceedings are valid if the case was not in fact removable. See *Southern Pacific Co. v. Waite*, 279 Fed. 171; *Commodores Point Terminal Co. v. Hudnall*, 279 Fed. 607; *First National Bank v. Bridge Co.*, 9 Fed. Cas. 88.³

The rule that the remand order is not reviewable stems from § 28 of the Judicial Code (28 U. S. C. § 71) and from many decisions adjusting the relationship of state and federal courts and the scope of authority of each in cases sought to be removed from the

¹ Feltenstein and another brought suit in a state court against Yankaus on October 11, 1915. On October 16, Yankaus filed a petition for removal in the state court, and on October 20 filed copies of all papers on record in the state court and an answer in the federal court. On the latter date the state court denied his petition for removal, and on October 26 entered judgment against him. On November 15, the federal court remanded the cause, and two weeks later the state court denied a motion to vacate the judgment. The state appellate court subsequently dismissed an appeal.

² It is not evident from the opinion that the judgment was taken by default, but this fact clearly appears in the record filed in this Court. Record, p. 7.

³ See *Pearson v. Zacher*, 177 Minn. 182; *Roberts v. Chicago, etc. Ry. Co.*, 48 Minn. 521 (certiorari denied, 164 U. S. 703); *Tierney v. Helvetia, etc. Ins. Co.*, 126 App. Div. 446; *State v. American Surety Co.*, 26 Idaho 449. — 652

Compare *Iowa Central Ry. Co. v. Bacon*, 236 U. S. 305; *Madisonville Traction Co. v. St. Bernard Mining Co.*, 196 U. S. 239; *Stone v. South Carolina*, 117 U. S. 430; *Phoenix Ins. Co. v. Pechner*, 95 U. S. 183; *Winchell v. Coney*, 54 Conn. 24; *Tomson v. Traveling Men's Ass'n*, 78 Neb. 400; *Golden v. Northern Pacific Ry. Co.*, 39 Mont. 435; *Dahlonga Co. v. Hall Mdse. Co.*, 88 Ga. 339; *Bishop-Babcock Sales Co. v. Lackman*, 4 S. W. (2d) 109.

former to the latter. The rule that proceedings in the state court subsequent to the petition for removal are valid if the suit was not in fact removable is the logical corollary of the proposition that such proceedings are void if the cause was removable. *Iowa Central Ry. Co. v. Bacon*, 236 U. S. 305; *Madisonville Traction Co. v. St. Bernard Mining Co.*, 196 U. S. 239; *Virginia v. Rives*, 100 U. S. 313; *Phoenix Insurance Co. v. Pechner*, '95 U. S. 183; *Home Life Ins. Co. v. Dunn*, 19 Wall. 214; *Gordon v. Longest*, 16 Pet. 97.⁴

When a petition for removal to a federal court is denied by the state court, the petitioner may do one of three things. He may object to the ruling, save an exception, and litigate the cause in the state courts. *Iowa Central Ry. Co. v. Bacon*, *supra*; *Stone v. South Carolina*, 117 U. S. 430; *Baltimore & Ohio R. R. Co. v. Koontz*, 104 U. S. 5; *Removal Cases*, 100 U. S. 457; *Gordon v. Longest*, *supra*. He may remove the suit to the federal court despite the ruling of the state court. *Baltimore & Ohio R. R. Co. v. Koontz*, *supra*; *Kern v. Huidekoper*, 103 U. S. 485; *Home Life Ins. Co. v. Dunn*, *supra*. He may proceed in both courts at the same time. *Kern v. Huidekoper*, *supra*; *Removal Cases*, *supra*.

If the petitioner litigates the cause in the state court and preserves an exception, he may have the order of the state court denying his petition for removal reviewed in the state appellate court. In proper cases he may come here asserting a denial of his right of removal. *Iowa Central Ry. Co. v. Bacon*, *supra*; *Stone v. South Carolina*, *supra*; *Removal Cases*, *supra*. If he removes the cause to the federal district court despite the state court ruling and the federal court assumes jurisdiction over the objection of his adversary, the latter, after final judgment, may contest this assumption of jurisdiction in the circuit court of appeals, and in this court in proper cases. *Powers v. Chesapeake & Ohio Ry. Co.*, 169 U. S. 92; *Cates v. Allen*, 149 U. S. 451; *Graves v. Corbin*, 132 U. S. 571. If petitioner proceeds simultaneously in state and federal courts and both render final judgments, he and his adversary may obtain review of the question of removability by following respectively the courses just outlined. *Kern v. Huidekoper*, *supra*; *Removal Cases*, *supra*.

Petitioner is protected whichever course he elects. If he makes timely application for removal and properly objects to its denial

⁴ See *Centaur Motor Co. v. Eccleston*, 264 Fed. 852; *Montgomery v. Postal, etc. Co.*, 218 Fed. 471; *Donovan v. Wells, Fargo Co.*, 169 Fed. 363; *Murphy v. Payette Alluvial Gold Co.*, 98 Fed. 321; *Johnson v. Wells, Fargo Co.*, 91 Fed. 1; *Shepherd v. Bradstreet Co.*, 65 Fed. 142.

652 by the state court, participation in subsequent proceedings in the state court is not a waiver of his claim that the cause should have been litigated in the federal court. *Powers v. Chesapeake & Ohio Ry. Co.*, *supra*; *Removal Cases*, *supra*; *Home Life Ins. Co. v. Dunn*, *supra*. Compare *Miller v. Buyer*, 82 Colo. 474; *State v. American Surety Co.*, 26 Idaho 649; *Ashland v. Whitcomb*, 120 Wis. 549. If he removes the cause notwithstanding the state court ruling, he may nevertheless resist further action by his opponent in the state court. *Kern v. Huidekoper*, *supra*; *Removal Cases*, *supra*.

However, the issue of removability is closed if the federal district court refuses to assume jurisdiction and remands the cause. Section 28 of the Judicial Code, *supra*, precludes review of the remand order directly (*Kloeb v. Armour & Co.*, 311 U. S. 199; *Employers Reinsurance Corp. v. Bryant*, 299 U. S. 374; *City of Waco v. U. S. Fidelity & Guaranty Co.*, 293 U. S. 140; *Ex parte Pennsylvania*, 137 U. S. 451), or indirectly after final judgment in the highest court of the state in which decision could be had. *McLaughlin Brothers v. Hallowell*, 228 U. S. 278; *Missouri Pacific Ry. Co. v. Fitzgerald*, 160 U. S. 556; compare *Pacific Live Stock Co. v. Lewis*, 241 U. S. 440.

Here, petitioner attempted to remove the cause, as he had a right to do, even though the state court had denied his petition for removal. The federal court held it was not removable as a separable controversy and remanded it to the state court. For the reasons already stated, we are not at liberty to review the remand order. Consequently, we must assume, so far as this case is concerned, that the suit was not removable. Having made this assumption, we must conclude that the state court had jurisdiction to enter the default judgment (*Yankaus v. Felterstein*, *supra*; *Southern Pacific Co. v. Waite*, *supra*), and it was for that court to determine the effect of the disclosure filed in the federal court. *Ayres v. Wiswall*, 112 U. S. 187; *Broadway Ins. Co. v. Chicago, etc. Ry. Co.*, 101 Fed. 507; compare *Tracy Loan & Trust Co. v. Mutual Life Ins. Co.*, 79 Utah 33. If, in cases like the present one, the state court is assured that the federal court will decide promptly the question of removability, it is better practice to await that decision (*Chesapeake & Ohio Ry. Co. v. McCabe*, *supra*; *Baltimore & Ohio R. R. Co. v. Koontz*, *supra*), but we cannot say that failure to do so is a denial of a federal right if the cause was not removable.

Accordingly, the judgment of the Michigan Supreme Court is affirmed.